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THE LAW OF SALES

BY

JOHN BARKER WAITE

PROFESSOR OF LAW, UNIVERSITY OF MICHIGAN

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PREFACE

To derive the best from any book, one must read it with knowledge of the ideas which underlie it and of the purpose with which it was produced. Every sincere book relating to law is inevitably and distinctly colored by its author's idea of what law is. Therefore it seems proper for me to present my own views.

I conceive law to be the aggregation of rules which courts of justice feel themselves more or less obligated to follow in deciding controversies. To some extent these rules are formulated and declared by legislative authority. Most of them, however, have been evolved by judges themselves.

These latter rules are not always easy to formulate; if they were, there would be no need for real text-books. Even the precise utterances of various judges can not always be accepted as rules. I believe that no judge has power, either practically or theoretically, to bind other judges by any declaration of rule or command, but that the only obligation felt by courts is the obligation to conform to prior judicial action. It is therefore prior judicial *conduct* under given circumstances which determines the action of later judges, rather than prior declarations as to what such conduct ought to be.

In the great majority of cases, actual decision does accord with the mere verbal declarations of what ought

to be done. But not infrequently a judge in deciding the case before him will state what he would have done had the facts been otherwise. He states what he believes to be a rule, without being called to act upon it. In many other cases judges have rendered decisions that actually conform to prior related decisions, but have given as reason for the decision some assumed rule which is really inconsistent with the earlier ones. These *dicta*, therefore, can not blindly be accepted as rules of law.

Rules of law, like the laws of any other science, must be deduced from a critical analysis and study of legal phenomena. And these phenomena, to my mind, are the decisions actually rendered by courts of justice. I do not mean that the comments and stated reasons of the judges may be disregarded. On the contrary, they are an intrinsic part of the phenomena of decision. They must be considered and given the fullest effect of guidance. But if one admits that, while judges may act on each case as it comes before them, they may not command other judges how to act, one must of necessity deduce the rule of action primarily from the acts themselves. Hence I have sought always for some judicial custom of decision, as indicating the rule of law more truly than does judicial speech alone.

In another respect, also, I have looked beyond the mere words of decisions. Judicial opinions often merely state the facts of a case as though they were in themselves a self-evident reason for the decision. No rule at all is stated. A text writer can follow this example and merely state the rule to be that when facts are thus and so the decision will be thus and so. But if law is truly the perfection of reason, there should be a rational basis for all

decisions—some reason founded on utility, or on consistency with other and correlated rules of law. Only through knowledge of these reasons—whether they rest in the utility of consistency only, or of something else—can a lawyer possibly predict what will be the decision—or advise the court what should be the decision—in cases of somewhat novel facts. It is only through deduction of the reason, the rule for decision, from study of many decisions that the essential facts can possibly be separated from the immaterial.

It is just this analysis, it seems to me, which distinguishes a text-book from a digest. The latter presents the phenomena. That is, it gives the facts and decisions of cases. The former takes enough of these phenomena for reasonable certainty and attempts, through inductive analysis, to present the underlying causes of the decisions for use in future cases. If it does not do this, it is only a compilation itself. A text-book and a digest are, therefore, not substitutes for each other, but one supplements the other.

The law of Sales has already been so well analyzed and presented by men like Williston and Meechem that a new book is hardly justified so far as substance of the rules alone is concerned. But, inasmuch as students of any science disagree more or less as to the causes of its phenomena, it is always possible that a new writer may bring something of value by way of explanation and of reason for the rules.

There is also possible value in a new manner of presenting an old subject-matter. Some books, for instance, group rules of law according to their relation to certain

concrete things, such as the "law of electricity" and the "law of automobiles." Likewise, they group the rules of a particular subject around certain things, or certain acts, as, in Sales, bills of lading, or delivery of possession.

On the other hand, the rules may be grouped according to persons affected, which is the plan I have chosen. Each rule may itself be discussed as relating to a legal right of one person, a lack of right in another, or a legal power of a third. For example, the transfer of a bill of lading by an insolvent buyer may, in some circumstances, terminate the seller's right to retake possession of the goods while still in transit. This one legal result can be discussed as a right of the buyer of the bill of lading to receive the goods themselves, as a lack of right in the original seller to retake possession, or as a power of the original buyer to cut off his seller's right of stopping the goods. Or the one rule can be discussed by repetition under all three forms. This last method has the advantage of the clarity which comes from demonstrating a matter in all its aspects. Nevertheless, it is not at all essential to completeness of presentation and does require a great amount of space. For the sake of brevity, I have discussed each rule only once, and, so far as practicable, I have treated each rule in the aspect of a right of some person. In some instances, however, notably as to the rights of original owners against persons other than the buyer, it seemed advisable, for the sake of orderliness, to put the discussion under lack of right of the other person.

Although discussing any particular rule once only saves considerable space, it does force upon the reader

the task of making his own comparisons between different rights, and requires him to remember that any right of one person connotes a complementary lack of right in other persons.

In presenting my own idea of what law is I have said that it is the rules which courts feel more or less obliged to follow. I do not believe that even in theory courts are absolutely bound to follow the rules of precedent. Actually, it is indisputable that they do modify and depart from established rules when they believe that economic utility so warrants. Witness, for instance, the development of rules as to implied warranty in sales of food. If courts do thus consider the economic effect of a decision, and consciously or subconsciously depart from the letter of established rules at the dictate of pragmatic considerations, one who would predict the decision in any case must do more than familiarise himself with the rules of precedent alone. He must observe and understand the trend of change which is taking place in those rules. He must be a student of socio-economic rules and theories as well as of the rules of legal precedent.

It is not improbable that, eventually, complete text-books will include an analysis of economic and social factors likely to affect judicial decision, which they will correlate with their discussion of precedent. The idea is most intriguing. I have, myself, however, made no attempt to do this, but have conventionally left to the reader the contentious question whether courts may properly depart from precedent and, when they do so depart, by just what considerations they are influenced.

It has been said that technical text-books are neces-

sarily too elementary and incomplete to be of much value to readers already trained in the subject, or are too difficult reading for untrained students. I do not think this is true of books on law. The subject is full of terms, to be sure, which have a technical connotation unrecognized by laymen, and many rules are really complexes of other more elemental rules which lawyers rather take for granted. But a book which uses words and phrases in their usual sense and which proceeds sequentially from elemental principles to the more complex ones can be clear and comprehensible to lay readers and yet be so detailed in its subject-matter as to serve also the needs of trained practitioners.

It is in this belief that I have written what follows, hoping that the small size of the book and its arrangement, without necessarily derogating its real technical value, will make it more available to some readers than a more voluminous work would be.

JOHN BARKER WAITE.

Ann Arbor, Michigan.

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THE LAW OF SALES

CHAPTER I

GENERAL PRINCIPLES

The law of Sales is concerned essentially with the transfer of ownership to personal property. It does not include the origin of ownership in the first instance, nor does it involve the character of the rights and liabilities which accrue to ownership. It comprises only the transfer thereof with the attendant rights and liabilities, whatsoever they may be, from one person to another.

Meaning of Sale.—A sale may be defined as the transfer from one person to another of the absolute ownership of some specific chattel, for a reciprocal compensation which is in money or something valued by the parties in terms of money.

The word "sale" has also a secondary meaning, in which sense it implies not an accomplished transfer of the ownership, but an agreement to transfer it. It may thus apply to an agreement which has been performed, or to an agreement to be performed, and its use in either significance is indiscriminate. Thus in some cases the court uses "sale" and "contract of sale" as quite different from "agreement to sell" and as meaning actual transfer of ownership.¹ On the other hand "sale" is often used in reference to the "contract" regardless of whether the contract has been carried to execution or not. Thus one court uses it in saying,² "In many cases of sales of personal property it is a very nice

1—Low v. Pew, 108 Mass. 347;
Oklahoma Moline Plow Co. v.
Smith, Okla., 137 Pac. 285; Black-

wood v. Cutting Packing Co., 76
Cal. 212, 9 Am. St. 199.

2—Oliphant v. Baker, 5 Denio
379.

and difficult question to determine * * * whether the title has passed."

If one bears in mind this duplex use, as indicating either an agreement to transfer the title, or an accomplished transfer, he will find no real confusion arising from it, despite the rather remarkable literal confusion, because the context practically always shows the sense in which it is employed.*

No definition is wholly clear unless all the terms by which it is expressed are themselves definite and precise. In defining "sale" as the transfer of ownership, one is met at the outset by an uncertainty as to just what constitutes "ownership." In the abstract it may be defined as the *fundamental* right to enjoyment of the particular thing to which it is said to attach. (It is obvious that the terms "right," "privilege," "power," and similar expressions are not used here in any precise sense, such as that of the so-called Hohfeldian terminology.) In the case of corporeal property, as distinct from mere "rights," enjoyment has always been so completely predicated on physical possession, that ownership is often defined in terms of possession, and is the fundamental right to possession of a particular piece of property.³

But in addition to the right of possession, there are other powers, privileges and duties in respect to things, which are recognized by the courts. Certain of these privileges, etc., commonly follow as a matter of course from ownership or, conversely, an owner is said to have certain definite privileges and liabilities.⁴

3—"So feeble and precarious was property without possession, or rather without possessory remedies, in the eyes of medieval lawyers, that Possession largely usurped not only the substance but the name of Property, and when distinction became neces-

sary in modern times, the clumsy term 'special property' was employed to denote the rights of a possessor not being owner." Pollock & Wright, "Possession," p. 5.

4—"The term 'property' although in common parlance fre-

*See Uniform Sales Act, Section 1, (1), (2), (3), (4), and 76, "Sale".

The composite whole of these powers, privileges and duties is ordinarily thought of as constituting ownership. Occasionally, however, it transpires that certain of these component powers, privileges, or duties, are attributed by courts to one individual while the others are, at least by implication, attributed to another. The query is at once presented, whether "ownership" can be divided, whether two persons, one having the right to ultimate possession and the other having different rights in respect to the same chattel, can both be called "owners" of it. If ownership is not divisible, so that they can not both be owners, how many of the component rights usually constituting "ownership," or which of them, are absolutely essential for the law to call their possessor owner? No attempt need be made to answer this question here, but specific reference to it is necessary because knowledge of the question is itself the solution of much confusion, to be pointed out later, as to whether or not "title" has passed when certain legal powers and privileges have passed and others have not.⁵

Sale Distinguished From Other Transactions.—A transfer of anything less than enough of these component rights and duties, to constitute the ownership—or, more concretely, a transfer of anything less than the fundamental right to control possession—is not a "sale" but is called by some other name such as "bailment," "pledge," etc. The name which a contract gives to a particular transaction does not determine the number

quently applied to a tract of land or a chattel, in its legal significance means only the rights of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy and dispose of a thing." *Eaton v. B. C. & M. R. R. Co.*, 51 N. H.

504. And see the excellent exposition in *Some Fundamental Legal Conceptions*. 23 *Yale L. Jr.* 16.

5—Cf., "The action * * * must be brought by the owner, although the ownership need not be absolute but may be that of a bailee." *Garvan v. N. Y. C. Rr.*, 210 *Mass.* 275.

and character of the powers and privileges transferred, but the name is itself determined by the number and character of the powers intended by the parties to be transferred. Therefore, in any given case the inquiry is not directly whether the transaction was intended to be by name a sale, or a bailment, or a pledge, but rather, what powers, etc., were intended to be transferred. The answer to this question can not be determined by any rule of thumb. Each case must be decided upon its own particular circumstances. All that can be said is that the real or apparent intent of the parties will control and is the thing to be determined. *If the parties intended the transaction to pass the ownership of the property the courts will call the transaction a sale and give it effect as such. If they intended to convey powers less than complete ownership the courts will call it something less than a sale and give it only such effect as was intended.*

—**By Whom Distinction Is Made.**—The real intention of the parties being the determinative issue, it would seem properly a fact to be determined by the jury.⁶

It is the province of the court, however, to decide, and to instruct the jury accordingly, just what rights and powers the parties must have intended to transfer to have intended a transfer of ownership and, conversely, what reservation of powers in the transferor constitutes a withholding of ownership from the transferee. Courts sometimes speak as though such reservation or transfer of particular powers showed intent. This transfer or reservation of particular powers constitutes as a matter of law a transfer or retention of ownership because it is incompatible with the legal idea

6—*Rauber v. Sundback*, 1 S. D. 268; *Crosby v. Del. & Hud. Canal Co.*, 119 N. Y. 334; *Id.* 128 N. Y. 641; *Id.* 141 N. Y. 589; *Brown Bros. v. Gilliam*, 53 Mo. App. 376;

Cook v. Lion Fire Ins. Co., 67 Cal. 368; *Webster Bros. Milling Co. v. Bingham*, 14 Ariz. 50.

of ownership in the other person. The lack of precision in speaking of the matter leads some courts to say that because the parties intended certain powers or duties to be in one party the title is in him, while other courts instruct the jury that *if* they find those particular powers or duties were intended to be in one person they must find that the parties intended title to be in him. The one thus appears to make title a matter of determination by the court from admitted facts, the other appears to leave it to the jury as a matter of intent. But it may be observed that the result is the same whether the court deduces it for itself from preliminary facts already ascertained, or orders the jury so to find upon the same preliminary facts. It is essentially these preliminary facts, that is to say, the particular powers and privileges which the parties intended to pass or not to pass, which must be ascertained by the jury. If the intent to pass certain rights and powers is admitted by the parties, or the court thinks it could not be disputed, the court can decide what *name* shall be given the transaction, as a matter of law; but if there is dispute as to what rights and powers the parties intended to pass, the case should be submitted to the jury with instructions as to what name they shall give the transaction accordingly as they find that the parties intended to pass or not to pass certain rights and powers. When, however, the entire transaction is in the form of a *written* contract, the court will “construe” the contract and decide for itself the question of what particular rights, powers and liabilities the parties intended to pass, and thus practically take the case from the jury entirely.⁷

—**Rules for Distinction.**—The courts have laid down a number of propositions as to what particular legal

7—Fleet v. Hertz, 201 Ill. 594, 94 Am. St. 192, See the peculiar combination in Ginsburg v. Lumber Co., 85 Mich. 439; Reissner v.

Oxley, 80 Ind. 580; D. M. Ferry & Co. v. Hall, 188 Ala. 178, L. R. A. 1917 B 620 containing a lengthy annotation.

powers the parties must have intended to transfer to constitute change of "ownership". *These all, however, have the common characteristic that they show which person was intended fundamentally to control possession and enjoyment of the thing.*

The law is simple enough, but it is obvious that in many cases there is no way of determining absolutely what the parties did intend in this regard. The issue becomes, therefore, merely a conclusion of mind from the particular facts and the facts are apt to be so inconclusive that two wholly fair and able minds may differ absolutely. It is this possibility of difference of opinion by two courts on essentially similar cases that makes much apparent conflict. It is not, however, a conflict of *law*, in the sense of a rule of determination, but only a difference of conclusion as to real intent. In such cases it is highly probable that the parties had no real intent as to title at all; did not think of anything beyond the immediate and obvious facts of the transaction. A finding of "intent," therefore, is only presumptive, a legal construction from the facts. Such constructive intent is properly a matter for the court rather than for the jury, which latter is supposed to ascertain only actual facts. But while, as noted above, very many courts do, themselves, make the finding as a matter of law, there are no established rules of presumption to guide them. What rules there are, simply declare what intent shall, or shall not, constitute a transfer of ownership, leaving court or jury to ascertain as matter of conclusion in each case what was the particular intent.⁸

W —Bailment.—Thus, *if* the parties intend that the particular thing transferred shall, sooner or later, be returned to the transferor the transaction is not a change

8—The process of forming a judicial opinion from the facts, without guiding rule, is shown in

Ex parte White, L. R. 6 Ch. Ap. Cas. 397, 19 Wkly. R. 488.

of ownership and not, therefore, a sale.⁹ And this is true even though the transferee of the thing is to do something to it, even to the extent of completely altering its form.¹⁰ On the other hand, an intention that the transferee need not return it constitutes a transfer of title despite the fact that he is to return something of like kind, or any equivalent.¹¹ It must be remembered, however, that the real intention of the parties in this respect is often very difficult to decide and is the true cause of dispute in the case.¹²

—**Sale on Approval.**—If the parties intend that the transferee of the thing shall have the option to return it or to keep it, the question of ownership depends upon a further fact of intention, namely whether the parties intend the thing to be *returned* unless the transferee shall choose to keep it, or to be *kept* by the transferee unless he shall choose to return it. The first intention does not pass title until the option is exercised and is usually called a “sale upon approval” or some synonymous phrase.¹³ The second intention passes title until the option is exercised, and is usually called something to the effect of a “sale with privilege of return.”^{14*} As one court said,¹⁵ “An option to purchase if he liked is

9—Bretz v. Diehl, 117 Pa. St. 589, 2 Am. St. Rep. 706.

10—Wheat delivered to transferee to be manufactured into flour and returned held to have remained the property of the transferor, Mallory v. Willis, 4 N. Y. 76.

11—Bretz v. Diehl, 117 Pa. St. 589, 2 Am. St. 706; Norton v. Woodruff, 2 N. Y. 153.

12—As an illustration compare the cases of Morton v. Woodruff, 2 N. Y. 153, and Mallory v. Willis, 4 N. Y. 76.

13—Fleet v. Heitz, 201 Ill. 594, 94 Am. St. 192, (court thought intent very clear); In re Miller & Brown, 135 Fed. 871; Hallidie v. Sutter St. Ry. Co., 63 Cal. 575, (court itself appears to have determined the question of intent).

14—Gottlieb v. Rinaldo, 78 Ark. 123, 6 n. s. 273. In re Miller & Brown, 135 F. 868; Hallidie v. Sutter St. Ry. Co., 63 Cal. 575.

15—Hunt v. Wyman, 100 Mass. 198.

*See Uniform Sales Act, Section 19.

essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once subject to the right to rescind and return."

So also when the parties have transferred possession with the intention merely that the transferee shall either sell the goods to another and return the money, or shall return the goods, the law is that title has not passed and there is no sale. The person in possession is not owner, but only an agent with authority to pass the title. Only when he does pass it is there a sale. Conversely, when the transferee of the goods is not to return them unless some contingency happens, even though he is to pay for them only as he sells them to some one else, the law is that title has passed. The former is usually called "consignment for sale" and the latter "sale with privilege of return".

^w — **Pledge.**—If the transferee is expected and intended by the parties to return the thing transferred unless the transferor shall fail to do something, (such as repay a sum of money received from the transferee, within a stated time,) the transaction is a "mortgage" or "pledge" rather than "sale" and does not pass title. The fact that the parties have themselves called the transaction a "sale" has comparatively little effect upon judicial determination of their intent at any time, but it seems to be of especially slight effect when the issue is between a sale or mortgage possibility.

— **Gift. Exchange.**—To constitute a sale there must be not only a transfer of title, but also a reciprocal transfer of money, or of something else on which the parties have placed a money value. This money recompense is not necessary to a transfer of title, but it is necessary to constitute the transfer of title a "sale". If the monetary recompense is absent the transaction is called by some other name. If there is nothing given in exchange for the title at all, the transfer is usually denominated

a "gift". If there is something exchanged for it, but no monetary value is fixed upon the exchange, the transaction is called a "barter and exchange".

So far as the privileges, powers and duties which constitute ownership are concerned it makes no difference whether the transfer was by way of gift, barter and exchange or sale. But whether the transaction is a sale or a gift does make a difference when the question is whether the transfer has taken place or not. And even in this respect there is no difference between a sale and an exchange. In the case of a gift it is held that no title passes until possession has been transferred, while in the case of either sale or exchange title may pass before transfer of possession—a point that is more fully discussed later.

The practical importance of the distinction between sale, gift and exchange arises whenever one of those transactions is attended, as a transaction, with certain consequences which do not follow from the others. Practically all cases involving a real difference and making the name important arise under statutes imposing a penalty upon certain "sales" which is not imposed expressly upon gifts and exchanges. Thus, a statute of Arkansas prohibited the "sale" of liquor to minors. A minor having become possessed of a quantity of whiskey which was not to his taste, induced a saloon-keeper to give him whiskey of a different quality in exchange for that which he already possessed. This saloon-keeper was then indicted for selling liquor to the minor contrary to the statute. The court discharged the defendant, on the mere statement of facts as admitted, because the transaction was not a "sale" but an "exchange", which latter was not forbidden by the statute.¹⁶ Under another statute

16—Gillan v. State, 47 Ark. 555. The court was undoubtedly influenced in this decision by the fact that a statute relating to Indians expressly forbade one to

"sell, exchange, give, barter or dispose of" liquor, while that relating to minors used the word "sell" only.

which forbade any one either to "sell" or to "give" liquor to a minor it was held that one was not guilty who furnished a minor whiskey in exchange for his promise to return a like quantity at a later date. The court said that the accused had neither "sold", since there was no price in money, nor did he "give", since he got something in exchange.¹⁷

The fact that some money is given in exchange together with other things, does not make the transaction a sale if the exchange as a whole has no monetary value placed upon it. Thus, a slave dealer exchanged two slaves which he owned plus \$100 in money for two other slaves. After the transaction had been carried out, one of the parties desired to evade its effect and alleged that it was void because the dealer had no license and a statute of the state declared that all sales, made under the circumstances, without a license should be void. The transaction was held valid, however, on the ground that it was not a "sale" even though part of the exchange was in actual money. The court laid down the proposition that actual money need not pass in order to constitute a sale, that in business life real money seldom does pass, but that whatever is given in exchange "must be treated as so much money" and its value must be estimated in relation to money, not merely in relation to the thing for which it is exchanged.¹⁸

As this court said, the consideration need not be in money, for the transaction to constitute a "sale", if its value is estimated in terms of money. Neither need

17—Coker v. State, 91 Ala. 92. This court expressly overrules the case of Com. v. Abrams, 150 Mass. 393, which had held precisely similar circumstances to constitute a "sale."

A "gift", even though by a hotel-keeper through the agency of a waiter and to one who expected to pay is not a "sale" within

a statute prohibiting sales, Com. v. Packard, 71 Mass. (5 Gray) 101; even though money be given back later as a bona fide return gift and not a mere colorable evasion, Finley v. State, Tex., 47 S. W. 1015; Acc. Wood v. Territory of Oregon, 1 Ore. 223.

18—Gunter v. Lecky, 30 Ala. 591.

the estimate be in accordance with what others might value it. All that is necessary is that the parties treat it as though it were the equivalent of a specified amount of money. Thus in *Brunsoold v. Medgorden*¹⁹ the plaintiff had sold land to defendant for a stated price of \$9600. It was agreed that the plaintiff would accept in lieu of money a certain stock of groceries valued at their wholesale cost. As a matter of fact the groceries were actually worth only about 70% of their wholesale price. Although the agreement was thus an exchange of groceries for land, with a fictitious value set upon the groceries, the court nevertheless, by way of *dictum*, declared the transaction to be a "sale" rather than a "barter and exchange".²⁰

For a transaction to constitute a sale it is not essential that the thought of transferring title have been in the minds of the parties, nor that the transfer of title have been the primary motive. It is enough to give the transaction the legal effects of a "sale" if it does in fact result in a transfer of ownership of the goods.²¹

19—Iowa, 153 N. W. 163.

20—*Picard v. McCormick*, 11 Mich. 68. As a matter of recovery of "purchase price" or "damages"; *Studebaker Corp. v. Gollmar*, 150 N. W. 442, 159 Wis. 226.

21—The furnishing of food in a restaurant is a "sale", so that an action for breach of warranty can be maintained. *Friend v. Childs Co.*, Mass., 120 N. E. 407; *Barrington v. Hotel Astor*, 171 N. Y. S. 840; *Leahy v. Essex Co.*, 148 N. Y. S. 1063; *Race v. Krum*, 146 N. Y. S. 197, *affd.* 222 N. Y. 410.

Contra, *Merrill v. Hodson*, 88 Conn. 314; *Valeri v. Pullman Co.*, 218 Fed. 519.

And so that statutes prohibiting "sales" of game, liquor, adulterated milk, etc. apply. *Com. v. Phoenix Co.*, 157 Ky. 180; *Com.*

v. Warren, 160 Mass. 533; *People v. Clair*, 221 N. Y. 108; *Com. v. Miller*, 131 Pa. 118; *State v. Lotti*, 72 Vt. 115.

Contracts to manufacture articles are held, in many jurisdictions, to be "sales" within the meaning of the Statute of Frauds.

Under the Statute, which requires certain contracts of "sale" to be in writing, the interpretation of the word is somewhat more liberal than is its interpretation under penal statutes. *Purcell v. Miner*, 4 Wall. (U. S.) 513; *Sursa v. Cash*, 171 Mo. Ap. 396; *Moss v. Culver*, 64 Pa. 414, 3 Am. Rep. 601; *Welch v. Bigger*, 24 Idaho 169. See the discussion under that heading.

Under the English "Profiteering Act", the furnishing of food by a

Subject Matter of Sales.—Anything can be sold which is capable of being owned in a legal sense.²²

The law permits the transfer of ownership of anything which it recognizes as being the object of property rights. It makes no difference therefore whether the subject of the sale is corporeal property, so tangible as a cow, for instance, or a mere incorporeal legal right, such as an invention whose exclusive use is secured by patent, or the good will of a business. A mere "privilege" of doing some particular thing may be transferred to another and the transaction will be called a "sale".²³

restaurant keeper has been held to be a "sale", *Rex v. Birmingham Profiteering Com.*, (1920) K. B. 57, 89 L. J. R. 57; so also the compounding of a prescription and transfer of the resultant product, *Rex v. Wood Green Profiteering Com.*, (1920) K. B. 55, 89 L. J. R. 55.

22—There are some rights which can be enforced against any person, and hence come within some definitions of a right *in rem*, but which so completely appertain to the individual in whose favor they run that they can not conceivably be transferred. Such, for instance, is the right of privacy and the right to a reputation—as distinct from business good will. While it may be said that these, although rights *in rem*, are incapable of transfer of ownership and therefore can not be the subject of a sale, it may also be said that they are not the subjects of ownership in a legal sense. The issue is, however, purely one of terminology; if such rights may be said to be "owned" they must be excepted from the statement of the text, which is in that case too broad in its unqualified form.

23—In *Hathaway v. Bennett*, 10 N. Y. 108, plaintiff had "bought" from X the privilege which X had by agreement with Bennett of selling the latter's newspapers through a certain district. The suit was occasioned by Bennett's refusal to supply papers to plaintiff. The contract held that Bennett might revoke the privilege at any time but that so long as it did exist it was capable of "sale" and its ownership had been transferred to plaintiff so as to make him owner of it.

In *Hoyt v. Holly*, 39 Conn. 326, 12 Am. Rep. 390, plaintiff, a physician had agreed with defendant that in return for payment by defendant he would introduce defendant to his patients and transfer to him the good will of so many as he could and would himself remove from practice. The issue was only whether such a contract was valid and enforceable and the court upheld it, calling it a "sale" of the good will.

The transfer of an interest in a partnership was called a "sale" in *Van Brocklin v. Smeallie*, 140 N. Y. 70, and declared to be effective. *Acc. Slidell v. McCoy's Exs.*

—**Choses in Action.**—Some effort has been made, from time to time, to distinguish between the transfer of property which exists because of a right of legal action against all persons generally and that property which consists only of a right of legal action against some particular person or persons. The former are technically called property rights, or rights *in rem*, and the latter are called rights *in personam*. At one time the latter, that is, the right of action against a particular person, could not be transferred. It could be exercised only by the person in whom it had been originally created. That is to say, the possessor of the right could go through all the motions and follow the forms of transferring it to another but the courts would refuse to allow that other to exercise it. In legal effect, therefore, it was not transferred. By a progress of development which need not here be discussed, it has come to pass that at the present day such rights of action can be transferred so that they may be enforced by the transferee in the name of his transferor at least, and usually in his own name. But because of the fact that at one point in the development of the legal privilege of transferring them they could be enforced by the transferee only in the name of the transferor, and the transferee could not be said therefore to be “owner” of the right of action, one finds frequent intimation that such rights can not be “sold”. “Assignment” of the right was the proper term for the transfer. But since the privilege of transferring the right of action has come to the point where the transferee can exercise it in his own name he has acquired at least one of the rights of ownership and is generally called “owner”. Likewise, the transfer is indiscriminately called “assignment” or “sale”. It is immaterial whether the transaction be

15 La. 340. The right to receive a part of rents collected by a receiver may be “sold” at judicial

sale to satisfy a judgment against the owner of the right, *Verplanck v. Verplanck*, 29 N. Y. Sup. Ct. 104.

called a "sale" or not; the fact is that the legal power to exercise certain rights of suit can now be transferred from one person to another.^{24*}

Contractual Features.—The law does not recognize a transfer of absolute ownership in a thing except as the result of mutual intention. The original owner must intend, actually or apparently, to give up his ownership in favor of the new party, and the new one must have a like intention to receive it.²⁵ (One possible exception is that of judicial sale wherein the ownership is transferred by order of the court regardless of the desires of the present owner.) Since agreement is essential to change of legal title, it may be said that every *sale*, in the sense of an accomplished transfer of title, is the result of an *agreement to sell*.

This agreement may be coincident with the transfer itself, or it may precede the actual transfer by a greater or less moment of time. When the agreement and transfer are coincident, the same acts of the parties serve to effectuate the transfer and to demonstrate the intent itself. If, for instance, B should walk into a store, pick up an article of merchandise, hand the proper price to the proprietor with the latter's acceptance of it, and leave the store with the article in his possession, all without a spoken word, there would coincidentally both be demonstrated a mutual intent that title should be

24—It does not seem necessary to the particular subject matter of this book to discuss in detail the development of the power to transfer rights in action nor the particular limitations still existing, all of which can be found in any good work on contracts. As to the various correlated rights, other than the mere right of suit, which the transferee of a right to sue acquires, and particularly whether

he does get the fundamental right of enjoyment, see the controversial articles by Messrs. Cook and Williston in 29 Harvard L. R. 816, 30 Harvard L. R. 99, 30 Harvard L. R. 449.

25—A finder of property does not acquire an absolute ownership since his rights are subordinate to those of the original owner even though he has all the rights of owner in respect to other persons.

*See Uniform Sales Act, Section 76, "Goods".

transferred and the transfer itself would be legally accomplished.²⁶

On the other hand, the parties may enter into a present agreement that ownership of a thing shall be transferred at some time in the future. This agreement, whether carried into execution coincidently with its formation, or subsequently to be fulfilled, has all the characteristics of an ordinary contract. If it has been executed and the transfer of title effectuated in accordance with it, the rules in respect to executed contracts apply. If the transfer has not been made, the rights of the parties are determined in accordance with the general rules of contracts to be performed. There must be the usual capacity of parties, consideration, absence of fraud or mistake and the like. This preliminary and necessary contract is not discussed as such in this book, but must be studied in works particularly devoted to that subject. It is sufficient here to call attention to the fact that *there must have been an effective contract to transfer the ownership, before the law will, by recognition thereof, create an actual transfer of the ownership.*

26—Peeters v. State, 154 Wis.

CHAPTER II

TRANSFER OF TITLE

RULES FOR DETERMINING THE PASSING OF TITLE

Passing of Title.—Assuming that the parties have so acted that there is a contract to which the law can give effect, the question at once arises whether the transfer of title has been accomplished. This is the issue on which, fundamentally, most of the litigation over sales has been based. On the answer to it rest, of course, the liabilities and rights of the parties in respect to the thing concerned.

The following discussion is necessarily divided into two sections. It is obvious, as a matter of logic, as well as a rule of law, that courts can not consider where the ownership of a thing resides unless they know what particular thing it is whose title is in question. Until the parties themselves have decided just what particular thing they intend to transfer, no court can say whether that thing has been transferred. Often the controversy is really duplex; *first*, whether the parties have in fact agreed upon the particular thing, and, *second*, whether if so agreed, they have transferred its ownership. The two issues can not possibly, with intelligence, be discussed or considered as one. The logical arrangement would be to treat the underlying question first, and to discuss the rules by which it is determined whether the particular thing has been agreed upon. But, for reasons which present themselves throughout the discussion, it seems practical wisdom to treat first the passing of title, upon an assumption that the parties have agreed upon the specific chattel affected, and then to discuss the correctness of that assumption.

Intent Governs.—When the transaction concerns a definite and specified thing, whose ownership the seller is legally capable of transferring, the primary and fundamental principle is, that *the title will be treated as having been transferred when the parties intend it should be, and only when they so intend.**

Change of Possession Not Essential.—There are no formalities or legal conditions which must be complied with before an intent to pass title will be given effect by the courts.† (But see the discussion of the “Statute of Frauds”.) It is not necessary, for instance, that possession be transferred for the ownership to be passed. Historically, the rule was otherwise; the rights of ownership were inseparable from physical possession.¹ In the case of a gift, already commented on as a transfer of ownership without anything received in exchange, this original necessity of a change of possession still exists. Courts will not recognize title as having passed by way of gift unless and until the possession of the thing has passed to the recipient of the gift. But it is now thoroughly settled that where there is a reciprocal exchange of something, even though it be only a promise, for the thing whose title is to be transferred, a change of possession is not essential to vest in the transferee, at least as against the transferor, rights and privileges which usually connote ownership.²

1—See Pollock & Maitland, II, 181.

2—The history of this development is summed up by Prof. Ames in 8 Harvard L. R. 252, 258. Perkins v. Halpren, 257 Pa. 402, 101 Atl. 741; Com. v. Hess, 148 Pa. 98, 17 L. R. A. 176; Cope's Est., 191 Pa. 589; Brewer v. Mich. Salt Assn., 47 Mich. 526; Sherwood v. Walker, 66 Mich. 568, 11 Am. St.

531; Shrimer v. Meyer, 171 Ala. 112; Wade v. Moffett, 21 Ill. 110, 74 Am. Dec. 79; VanBrocklin v. Smeallie, 140 N. Y. 70, 72; Baker v. McDonald, 74 Neb. 595, 1 L. R. A. (n. s.) 337; Bradley v. Wheeler, 44 N. Y. 495; Bertelson v. Bower, 81 Ind. 512; Schwab v. Oatman, 113 N. Y. S. 910; Lickbarrow v. Mason, 2 T. R. 63; 1 H. Blackstone 357; 2 Id. 211;

*See Uniform Sales Act, Section 18, (1), (2), 19.

†See Uniform Sales Act, Section 3.

It is true that if possession is not passed to the buyer, third persons acting in good faith may acquire from the seller the rights of ownership as against even the first buyer. In a sense, therefore, until possession actually passes to the buyer the seller has still the legal power to control the right to possession. And so, in a sense, he has practical ownership. If he chooses fraudulently to sell to a third person who takes possession, that person has, in some jurisdictions, the legal right to keep possession, and, hence, has ownership. This might be put upon the ground either that the original buyer's rights are set aside in favor of the third person because he failed to take possession, or that title remained in the seller because of his continuing in possession and could still be passed to the third person. The decisions themselves are not clear as to what ground they rest on. Some of them do use expressions which make it appear that they consider "ownership" never to have passed to the original buyer because he did not have possession.

At most, however, this apparent conflict is one of terminology only—namely, how completely and exclusively

5 T. R. 683; *Meade v. Smith*, 16 Conn. 345; *Whitcomb v. Whitney*, 24 Mich. 486; *Poling v. Flanagan*, 41 W. Va. 191; *Dixon v. Yates*, 5 B. & Ad. 313, 340, "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery.

* * * Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained; but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they

would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore is to vest the property in the bargainee." *Fellows v. Bost. & Me. R. R.*, 78 N. H. 594, 98 Atl. 481; *Johnson v. Tabor*, 101 Miss. 78; *Young v. Ingolsbe*, 208 N. Y. 503; *Townsend v. Hargraves*, 118 Mass. 325; *Briggs v. U. S.*, 143 U. S. 346.

Contra, dictum only, *Georgia Marble Works v. Minor*, 128 Ark. 124, 193 S. W. 498.

must one control the legal right of possession in order properly to be called the legal "owner". The courts are agreed, that, whatever he be called, the buyer, even though he does not take possession, has all the customary rights and liabilities of ownership except as to certain third persons who take possession from the seller in good faith.³ Furthermore, the overwhelming majority of opinions speak of him as having acquired the "ownership". Accordingly his rights will be called "ownership" in this discussion.

The ownership may pass to the buyer, if the parties so intend, even though by their agreement he has not even the right to possession, without further act, such as payment of the price.⁴

Likewise, certain rights generally appertaining to title will pass to the buyer even though the goods are in the adverse possession of a third person, and the transaction is generally called a "sale".⁵

Payment Not Essential.—Payment is not essential to the passing of title when the parties have not intended that it shall be.⁶

Presumptions of Intent.—This rule, that the intention

3—The rights of such third persons are discussed *Post*, p. 212.

4—Clark v. Greeley, 62 N. H. 394; State v. Mullin, 78 O. S. 358, 125 Am. St. 710; Obery v. Lander, 179 Mass. 125; Lester v. East, 49 Ind. 588; Tarling v. Baxter, 6 Barn. & Cress. 360.

5—Cartland v. Morrison, 32 Me. 190. But compare the decisions, based upon public policy, in O'Keefe v. Kellogg, 15 Ill. 347; McCully v. Hardy, 13 Ill. Ap. 631; Erickson v. Lyon, 26 Ill. Ap. 17; Young v. Ferguson, 11 Ky. 298. See the contention of Mr. Ames, that "title" does not pass, in 3 Harvard L. R. 342.

6—Thompson v. Brannin, 94 Ky. 490; Allen v. Rushfort, 72 Neb. 907; Bayne v. Hard, 79 N. Y. S. 208; Richardson v. Insurance Co., 136 N. C. 314, but compare, Hughes v. Knott, 138 N. C. 105; Parker v. Davis, 13 O. C. C. R. 631; Tarling v. Baxter, 6 Barn. & Cress. 360; see also cases cited above and those referred to in subsequent sections.

By statute of some states payment is made an essential to the passing of title of certain kinds of goods. See the discussion under "conditions precedent", *Post*, p. 33.

of the parties determines when title passes to specific property, is simple and explicit enough, and involves no difficulty when the parties have made their intention clear. Controversy arises only where the parties can not agree as to what their intent was, or had no conscious, no real intent as to title at all.

If the parties had an actual and conscious, although unexpressed, intent, it would properly be the function of a jury to determine what it was, as a question of fact. But, it is common experience that the parties to a sale very seldom have any conscious thought whatever as to the exact point of events at which title is to pass. The ultimate result is all that enters into their calculation. It is impossible in such case to speak of the "fact" of their intent. There is no such fact. Yet there must be some point in the transaction at which title passed, and it becomes the duty of the court to say what this point was. This is not a finding of fact, but rather a decision of what the court thinks would have been the fact if the parties had thought about the matter. In other words, it is a judicial conclusion as to what normal men in like circumstances *would probably have intended* had their attention been directed to the matter. This distinction between finding the actual fact of intent by a jury, and a conclusion by the court of what might have been the normal intent had there been a conscious one, has not been clearly made by the courts.

Some courts have left the question of intent to the jury, without discussion of reason for so doing, apparently as a matter of course, as though it were a question of fact.⁷ Generally, however, where the matter is left to

7—In *Graff v. Fitch*, 58 Ill. 373, the trial court left the matter with the jury with instructions that, if they found certain facts as alleged, title did not pass. This was held error by the Supreme Court on the ground that such facts only created a presumption that title

was not intended to pass, and the jury should have been left to decide the real intention. In *Richardson v. Ins. Co.*, 136 N. C. 314, it was held that the question of intent should have been left to the jury. See *Stewart v. Henningson Produce Co.*, 88 Kan. 521,

the jury at all, it is left with specific instructions that a strong presumption of intent arises from certain facts.⁸

The great majority of courts, without specifically saying anything about it, treat this intent as a question to be determined by the court according to established rules of presumption. These rules of presumption are built upon certain factors which are frequently recurrent in transactions of sale, and which, because of their common recurrence, furnish standards that will apply to nearly every case.

✓ **—Form of Agreement.**—The tense of the words used does not have any material weight with the court. In *Tarling v. Baxter*, for instance,⁹ it was held that title had passed, although the form of the agreement was to pass title in the future, being, "I have * * * agreed to sell" and "I have * * * agreed to buy". In *Sherwin v. Mudge*¹⁰ the words were "A sells and B buys", but the court held that there was no intent to pass the title at that time.¹¹

—Nothing Remaining to be Done by Seller.—In general, if nothing remains to be done, under the terms

50 L. R. A. (n. s.) 111; *Wilkinson v. Holiday*, 33 Mich. 386; *Morrow v. Reed*, 30 Wis. 81; *Cunningham v. Ashbrook*, 20 Mo. 553; *Weld v. Came*, 98 Mass. 152; *Burrows v. Whitaker*, 71 N. Y. 291; *Andrew v. Dieterich*, 14 Wend. (N. Y.) 31; *Moats v. Strange Bros. Hide Co.*, 185 Ia. 356, 170 N. W. 456.

8—*Cunningham v. Ashbrook*, 20 Mo. 553; *Burrows v. Whitaker*, 71 N. Y. 291; *Lingham v. Eggleston*, 27 Mich. 324. In *Cassinelli v. Humphrey Supp. Co.*, 43 Nev. 208, 183 Pac. 523, it was held to be a question for the court if it involved the construction of a written contract, or if the facts

were undisputed—thus leaving for the jury only the finding of the overt facts from which the court might deduce the intent. Accord, *Miller Milling Co. v. Butterfield, etc., Co.*, 32 Idaho 265, 181 Pac. 703; *Pittsburgh etc. Co., v. Cudahy Co.*, 260 Pa. 135.

9—6 Barn. & Cress. 360.

10—127 Mass. 547.

11—*Walti v. Gaba*, 160 Cal. 324; *Hanson v. Meyer*, 6 East 614, "I have bought"—title held not to have passed. *Piano Co. v. Piano Co.*, 85 O. S. 196, "I hereby transfer my full right of ownership" held not indicative that title was passed.

of the contract, except for the buyer to pay the agreed price and take possession, the courts assume, in the absence of any showing of contrary intention, that title has passed. The presumption is that the parties intended the title to pass as soon as everything else was done according to contract, regardless of the physical possession, or of actual payment.^{12*} But if parties clearly intend that title shall not pass until payment, the courts will give effect to that intention.

—**Something Remaining to be Done by Seller.**—On the other hand, it may be said broadly that whenever the parties have agreed that the seller is to do some act before the buyer could logically and naturally, according to the agreement, take possession, a strong legal presumption arises that they did not intend title to pass until that act should be done.

The reason for this presumption is variously stated, and is not definitely ascertainable. But, although the courts which follow this rule do not themselves state the reason for it, there is a possible reason which very logically justifies this presumption of intent. Ownership carries with it the risk of loss. It is a fair presumption that a buyer would not intend to take title to goods and to assume this risk of loss, unless he could have also the right to protect his goods from loss without violating the terms of the agreement. In cases where the seller is to

12—Tarling v. Baxter, 6 Barn. & Cress. 360; VanBrocklin v. Smeallie, 140 N. Y. 70; Baker v. McDonald, 74 Neb. 595, 1 L. R. A. (n. s.) 474. Piano Co. v. Piano Co., 85 O. S. 196.

Contra, dictum only, that payment is a prerequisite to passing of title, Hanson v. Meyer, 6 East 614.

A number of decisions, particularly the very earlier ones, con-

fine this presumption to cases in which it positively appears that payment was not to be immediate, as where a term of credit is expressly given. See the discussion under "Cash Sale", *Post*, p. 33. Paul v. Reed, 52 N. H. 136; Mich. Cent. Ry. v. Phillips, 60 Ill. 190.

See also cases cited *ante*, that title may pass before payment and delivery.

*See Uniform Sales Act, Section 19, Rule 1.

weigh or otherwise measure the goods in order to determine the total price, it is presumable that the agreement contemplates the seller's keeping possession until he does do such weighing. If, then, the buyer should, without the seller's permission, take possession of the goods before the seller had weighed them, he would violate the implied terms of the agreement. It is not reasonable to assume that the buyer intended to take title to goods at a time when he could not physically protect them from loss without violating his agreement with the seller. To say that legally he could take possession without violation of the contract, because he has title, is begging the question. By the terms of the agreement he can not take possession until the seller has done the weighing and therefore can not act freely to protect the goods. The presumption that he does not intend to take title under such circumstances has, therefore, a thoroughly sound reason for its existence.

In accordance with this general rule, if goods whose total measurement is unknown are sold at a stipulated price per unit, and it is the duty, or the privilege, of the seller, with or without the buyer's aid, to weigh or otherwise measure the mass in order to determine the total price, it is presumed that title was not intended to pass until that should be done. In the cases coming within this rule it may be observed that the agreed control of possession is in the seller. The buyer is not entitled to take possession until the seller shall have exercised his privilege, or performed his duty, by determining the total price. On the action of the seller therefore depends the agreed, as possibly distinct from the legal, right to possession. The buyer can not tender payment and take possession—and so protect himself from loss—until the seller has determined what the total price is. The same thing is true when the seller is to ascertain the quality of the goods in order to fix the actual price, and, in general, when the seller is the one who is to do anything whatever that is necessary to a determination of the

total price to be paid. In all such cases the legal presumption is that the parties did not intend title to pass until the thing should have been done.^{13*}

As this rule is practically founded on the decision in *Hanson v. Meyer*,¹⁴ and that was not a *presumption* of intent, but rather a rule that *title could not pass* till payment, it may be doubted if there is any real reason, other than judicial custom in following precedent, behind the present rule. However, the rule itself exists as stated, and it can at least be justified by the reason suggested by the writer.

Even if the measuring or other thing to determine

13—*Kein v. Tupper*, 52 N. Y. 550 (quality); *Frost v. Woodruff*, 54 Ill. 155; *Lester v. East*, 49 Ind. 588; *Smith v. Wisconsin Investment Co.*, 114 Wis. 151; *Robbins v. Chipman*, 1 Utah 335 *dictum*; *Wesoloski v. Wysoski*, 186 Mass. 495; *Simmons v. Swift*, 5 Barn. & Cress. 857.

In *Hanson v. Meyer*, 6 East 614, the rule is apparently put on the ground that the buyer could not pay the price till the goods were weighed and that, contrary to the general rule, title could not pass till payment.

Boaz & Co. v. Schneider & Co., 69 Tex. 128, appears to be contrary to this rule, but is not necessarily so. The court does say, "Where the entire mass is sold and must be measured simply with a view to the ascertainment of its price for the purpose of a settlement, the title passes". In expression this is in conflict with the presumption as stated. The actual decision, however, could have been reached without any conflict. The other circumstances were easily sufficient to rebut the usual presump-

tion, and, indeed, it appears that the measuring was not to have been done by the *seller* at all but by the buyer. The form of statement was founded only on the veriest *dictum* in *Cleveland v. Williams*, 29 Tex. 204.

Lassing v. James, 107 Cal. 348, holds with some confusion of language, that title had passed despite necessity of weighing by both parties, to determine total price. The opinion was based on a mere *dictum* in *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, referring to *lack of identification* of the property. See also *Groat v. Gile*, 51 N. Y. 431. In this case the court confounded the presumption with the rule that title can not pass till *identity* is established and, the latter having been satisfied, ignored the former. *Sanger v. Waterbury*, 116 N. Y. 371.

As soon as the weighing or measuring has been done by the seller title passes instantly. *Thompson v. Brannin*, 94 Ky. 490 *dictum*.

14—6 East 614.

*See Uniform Sales Act, Section 19, note.

the price is to be done by the seller, if it is merely to adjust an agreed proximate price, no presumption that the seller intended to keep title arises. In so far as this rule is confined to cases in which the buyer is permitted, by the contract, to take possession at the agreed approximate price, without awaiting further weighing, etc., this exception is quite in accord with the underlying reason suggested.¹⁵

Neither is it presumed that the seller intended to keep title if the determination of the price is a mere mathematical calculation not requiring him to retain possession of the goods.¹⁶

In regard to all these statements of rule, it must be said that there is much conflict and utter confusion of ideas in the decisions and opinions.

It is sometimes stated, that if the seller is to do something to complete the goods, or to put them in a deliverable state, title is presumed not to have passed.^{17*} The reason for this rule may be that suggested above—that the buyer would hardly intend to take title and its attendant risks while barred from immediate possession by the seller's right or duty to do something which would necessitate his possession—or it may be because the thing whose title the buyer has contracted to accept is not in existence till the seller's work is done. Thus, if the sale were existing rough castings, to be polished by the seller, it might be either that the parties considered the rough castings as the thing sold and purchased, with a collateral agreement that the seller should polish them, or that they intended to transfer title only to polished castings made from the rough castings pointed out. If they had in mind the former transaction, if title did not pass it would be for the former reason. But if they had

15—*Lingham v. Eggleston*, 27 Mich. 324; *Swanwick v. Sothorn*, 9 Adolph. & El. 895.

16—*Bradley v. Wheeler*, 44 N. Y. 495.

17—*Blackwood v. Cutting Packing Co.*, 76 Cal. 212.

*See Uniform Sales Act, Section 19, Rule 2.

in mind the second transaction, obviously there would be no title to pass until the things contemplated—the polished castings—should come into existence through the seller's having done the work. Even in clear cases of fact, however, the particular reason on which the courts hold that title has not passed is usually indeterminate.¹⁸

Of course, if the facts clearly indicate that the parties intended title to pass before the seller's further duty should be performed the courts will give effect to that intention.¹⁹

—**Something to be Done by Buyer.**—The presumption that there was no intent to pass title does not arise if the weighing, measuring, etc., to determine the total price is to be done by the buyer. This, again, is in precise accord with the underlying principle suggested. If the buyer is to do the weighing, etc., the determination of the total price is within his own volition. It is true that actually the seller may not let the buyer proceed, but by the terms of the agreement, as distinct from physical power, the buyer has the power to control possession, can take possession when he chooses, without waiting for the seller to act, and is thereby indicated as the intended owner.²⁰

However, as the rule, that title would not pass if there was something to be done by the seller, originated in the idea that determination of total price was preliminary to payment, which was itself a prerequisite to the passing of title, some courts have followed the original statement without making any distinction of those cases where it is to be done by the buyer. Likewise there is considerable statement to the effect that if something is to be done

18—*Blackwood v. Cutting Packing Co.*, 76 Cal. 212.

19—*Byles v. Collier*, 54 Mich. 1; *Owen v. Dixon*, 11 Ky. L. Rep. 902.

20—*Bradley v. Wheeler*, 44 N. Y.

495; *Lingham v. Eggleston*, 27 Mich. 324; *Burrows v. Whitaker*, 71 N. Y. 291; *Odell v. Boston & Maine R. R.*, 109 Mass. 50; *Turley v. Bates*, 2 Hurl. & Colt. 200.

by either party to determine the total price, title is presumed not to pass regardless of whether it is the seller or the buyer who is to do the necessary acts. This is apparently derived from a confusion with the rule of law that until goods have been *identified*, as by measuring or sorting from a larger mass, title *can* not pass. But again the conflict is for the most part one of expression only and in practically every case where the broad statement appears it will be found that other factors would themselves have precluded a presumption of intent to pass title.²¹

If the parties are to act jointly in doing whatever is necessary to determine the price it is presumed they intended the title to stay where it was until such acts should be done.²²

—**Delivery to Buyer.**—If there has been actual delivery to the buyer any presumption arising from the necessity of measuring, or doing other things, is rebutted.²²

—**Rebutting Circumstances.**—These rules, like those

21—Andrew v. Dieterich, 14 Wend. (N. Y.) 31, has been cited as in conflict but the case itself shows that payment had been made a condition precedent to the passing of title. Ballantyne v. Appleton, 82 Me. 570, seems flatly in conflict. In McFadden & Bro. v. Henderson, 128 Ala. 221, the facts show that the seller was obligated to do certain other things, which he did not do, before the buyer could weigh. In Hoffman v. Culver, 7 Ill. Ap. 450, the real reason for the holding was that "payment was a condition precedent to the passing of title".

22—Lingham v. Eggleston, 27 Mich. 324; Allen v. Greenwood, 147 Wis. 626; Mount Hope Co. v.

Buffington, 103 Mass. 62; Macomber v. Parker, 13 Pick. (Mass.) 175; Scott v. Wells, 6 W. & S. (Pa.) 357; Leonard v. Davis, 66 N. Y. 476; Farmers Phosphate Co. v. Gill, 69 Md. 537, 1 L. R. A. 767; Cunningham v. Ashbrook, 20 Mo. 553; Turley v. Bates, 2 Hurl. & Colt. 200.

Contra in expression although the same decisions could have been reached on other and consistent grounds stated, are Andrew v. Dieterich, 14 Wend. (N. Y.) 31; Hoffman v. Culver, 7 Ill. Ap. 450; Ballantyne v. Appleton, 82 Me. 570.

23—Keim v. Tupper, 52 N. Y. 550; H. M. Tyler Lumber Co. v. Charlton, 55 L. R. A. 301.

referred to later on, are rules of presumption only and are not rules of title. They do not imply that title must pass if nothing remains to be done, nor that it can not pass if something is still to be done by the seller. They merely furnish formulæ by which, in the absence of any indication of real intent, the courts can reach a consistent assumption of what the parties probably would have intended had they thought about the matter. This presumption is fully subject to rebuttal by any particular circumstance in the case that leads the court to believe the parties would normally have intended otherwise.²⁴

Likewise, *a fortiori*, these rules for consistently ascertaining mere constructive intention give way before anything which shows a contrary *real* intention.

Some few cases seem to be opposed to the proposition that these rules are presumptions only. Their verbiage states that title has passed, or has not passed, because of the circumstances, as a matter of law. To some extent this is due to a feeling that unless credit is expressly given title can not be presumed to have passed till payment has been made, and that until the price is determined payment can not be made.²⁵ But this, as has been noted, is in conflict with the general rule that title may have passed even though payment has not been made, and out of harmony with the cases holding that no presumption adverse to the passing of title arises when the buyer is himself to ascertain the price. Examination shows this statement of irrebuttable rule to be usually verbiage only and that in the particular case the presumption is in fact un rebutted and, as a presumption only, would lead to the same result.²⁶ The writer does not

24—Wilkinson v. Holiday, 33 Mich. 386; Byles v. Colier, 54 Mich. 1; Graff v. Fitch, 58 Ill. 373; Lynch v. Merrill, 72 W. Va. 514, 46 L. R. A. (n. s.) 192; Morrow v. Reed, 30 Wis. 81; State v. O'Neil, 58 Vt. 140; many authorities are collected in the note in 26 L. R. A.

(n. s.) 1. Martineau v. Kitchin, L. R. 7 Q. B. 436; Lingham v. Eggleston, 27 Mich. 324; Ellis & Myers Lumber Co. v. Hubbard, 123 Va. 481, 96 S. E. 754.

25—*Ante*, p. 24.

26—Hamilton v. Gordon, 22 Ore.

know of an accepted case in which evidence sufficient to rebut the presumptions has been ignored on the ground that the rule was conclusive and not presumptive. Much of the confusion of expression arises from confusion in thought with the rule of law that title can not pass, whatever the intent, until property has been *identified*. Sometimes this identification is to be by measuring off from a larger lot and such measuring by way of identification has been confused with the measuring of identified property in order to ascertain total price. The ensuing conflict of expression is unfortunate, but no real conflict of holding seems to have arisen.²⁷

—**Delivery to Carrier.**—The delivery of property to a carrier for transportation to the buyer, in the absence of anything else, raises a presumption of intent to pass title, if it has not already passed. As the matter of passing title to property by delivery to a carrier is inextricably interwoven with that of specification of property by such delivery, the topic is left for discussion under the latter subject.

—**Agreement by Seller to Deliver.**—An undertaking by the seller to deliver the goods to the buyer at a particular place seems occasionally to have led to a holding that title did not pass until such delivery had been accomplished. In *Gibson v. Inman Packet Co.*,²⁸ the plaintiff had sold cotton to B “to be delivered at N in merchantable shape”. It was delivered to the defendant, as a

557; *Joyce v. Adams*, 8 N. Y. 291; *Pinckney v. Darling*, 3 App. Div. (N. Y.) 553; *Frost v. Woodruff*, 54 Ill. 155.

27—If there are facts in the particular case which it is argued show a real intent, in conflict with the ordinary legal presumption, is the decision whether they do in truth suffice to rebut that presumption to be made by the court,

or left to a jury under proper instructions? There appears to be no definite answer to this. In some cases the decision has been made by the court. In some cases it has been left to the jury.

Lynch v. O'Donnell, 127 Mass. 311; *Lingham v. Eggleston*, 27 Mich. 324.

28—111 Ark. 521, Ann. Cas. 1916 A 1043.

carrier, consigned to B at N, and was damaged through the negligence of the defendant before delivery. On suit by the plaintiff to recover for this loss the defendant contended that the plaintiff was not the proper person to bring suit as he had parted with title by his shipment to the buyer. The court admitted the primary presumption to be that title had passed, but held that a contrary intention was shown by the agreement to deliver in merchantable shape.²⁹ In *Brown v. Adair*³⁰ the buyer of fertilizer set up, in defense to an action for the purchase price, a statute of the state making such sales void unless certain tags were attached to the bags of fertilizer at time of sale. The seller proved that tags were attached at time of contract to sell. The court held, however, that inasmuch as the sale was to be "f. o. b." at a certain place the sale was not consummated till delivery to that place and it must be shown that tags were attached at that time.³¹

The effect of an undertaking to deliver is, however, like other matters, merely a circumstance evidencing intention in regard to title and it will not prevail if other evidence points to a contrary intent.³²

Some courts when faced with an issue of the effect upon the passing of title of an obligation to deliver have left it to the jury to say what intent was demonstrated by the agreement as to delivery, coupled with all the other circumstances.³³

This is quite in accord with the rule laid down by some courts that where more than one inference of intent can be drawn from undisputed facts the question of intent must be left to the jury. But those courts which decide

29—*Accord, Garvan v. N. Y. C. & H. R. R. R.*, 210 Mass. 275, holding that seller's "obligation to deliver" caused title to remain in him so that he could sue the carrier for negligence. *Westmoreland Coal Co. v. Syracuse Lt. Co.*, 145 N. Y. S. 420 *semble*.

30—104 Ala. 652, 16 So. 439.

31—*Accord, Ala. Natl. Bk. v. Parker*, 146 Ala. 513.

32—*McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302; *Terry v. Wheeler*, 25 N. Y. 520.

33—*Blakiston v. Davies, Turner & Co.*, 42 Pa. Sup. Ct., 390.

for themselves that an intent not to pass title is evidenced by an undertaking to deliver evidently feel that a rule of inference has grown up in respect to it, just as the *prima facie* inference that intent to pass title is evidenced by delivery to a carrier has become a rule of law and is not left to the jury.³⁴

While the circumstance of a seller's agreement to deliver to a particular place is frequently recurrent, there is comparatively little precedent which shows the judicial idea of its effect on *title* because the question of title seldom arises. When a seller has contracted to deliver at a certain place as an integral part of the consideration for the buyer's promise to pay, obviously he can not recover the contract price, whether title has passed or not, until he has made delivery. Usually the promise to deliver is inseparable from the promise to pass title, and both promises form the single consideration for the promise to pay. Therefore in cases arising between seller and buyer themselves courts usually decide whether there is an obligation to deliver or not (and whether, if there is, it has been accomplished) as a condition precedent to recovery, and they do not pretend to pass upon the question of title. That a seller who has failed to deliver as agreed in the contract can not recover the contract price is settled.^{35*}

Whatever be the rule as to the effect of a seller's undertaking to deliver at a particular place, it must first be determined whether the seller did assume such an obligation. If there is doubt as to the terms of the agreement the question should, of course, be left to the

34—*Blakiston v. Davies*, *Turner & Co.*, 42 Pa. Sup. Ct., 390; *Dannemiller v. Kirkpatrick*, 201 Pa. 218; *Garvan v. N. Y. C. & H. R. R. R.*, 210 Mass. 275.

35—*Braddock Glass Co. v. Irwin & Co.*, 153 Pa. 440; *Devine v. Edwards*, 101 Ill. 138; *Hessig-Ellis*

Drug Co. v. Priesmeyer, 151 Mo. App. 484; *Westmoreland Coal Co. v. Syracuse Lt. Co.*, 145 N. Y. S. 420, which case appears to have been decided on the issue of title, rather than on non-performance of a condition precedent; *McLaughlin v. Marston*, 78 Wis. 675.

*See Uniform Sales Act, Section 19, Rule 5.

jury. When the question turns not on disputed terms of an agreement, but on a construction of the meaning of an admitted agreement, the issue is decided by the court. A common expression in agreements is that the goods are to be delivered "f. o. b." at a certain place. This is interpreted to mean that freight is to be paid to that place by the seller. As to what it means in respect to the seller's obligation to make safe delivery to that place, as a condition of the contract, courts are not at all agreed. If the agreement is "to deliver, f. o. b." it is clearly an undertaking, as it reads, to *deliver*. But the conflict is over agreements not so clear, as where the contract is to "sell" at a named price, "f. o. b. destination". Some courts have held that such an agreement implies an obligation to deliver.³⁶ Others have decided the contrary and held that despite such a term in the contract title passes on delivery to the carrier according to the usual presumption.^{37*}

Conditions Precedent to Passing of Title.—When the agreement of sale clearly indicates, expressly or impliedly, that payment is to be made "on delivery of possession" there is much conflict as to whether it shall be presumed that the parties intend payment as a condition precedent to passing of *title* as well as to the delivery of possession. As has already been noted, the fact that delivery of possession has not been made, nor the price paid, does not preclude the passing of title. On the contrary, title is presumed to have passed if nothing remains to be done by the seller, despite non-delivery and non-payment. Even the fact that the buyer can not

36—Ala. Natl. Bk. v. Parker, 146 Ala. 513; Brown v. Adair, 104 Ala. 652.

37—Burton & Beard v. Nacodoches Co., — Tex. Civ. Ap. —, 161 S. W. 25; Twitchell-Chaplin Co. v. Radovsky, 207 Mass. 72,

agreement that buyer might deduct cost of freight from purchase price held not to prevent title passing on shipment; Neimeyer Lumber Co. v. Burlington R. R., 54 Neb. 321; U. S. v. Andrews & Co., 207 U. S. 229.

*See Uniform Sales Act, Section 5.

take possession until payment does not necessarily indicate that title has not passed. But a stipulation for "cash on delivery" *may* denote an intention not to pass even title until payment. As one court puts it,³⁸ "A sale for cash is not necessarily a conditional sale. The phrases 'terms cash' and 'cash down' may or may not import that payment of the price is made a condition precedent to the transfer of the title, according to the intent of the parties. If by the use of these terms the parties understand merely that no credit will be given, and that the seller will insist on his right to maintain possession of the goods until the payment of the price, the sale is still so far completed and absolute that the property passes; but if it is to be understood that the goods are to remain the property of the seller until the price is paid, the sale is conditional and the title does not pass". This statement is, of course, in absolute accord with all the authorities, i. e., that the intention of the parties governs.

———"Cash Sales."—But the question still remains, what intent is indicated by the stipulation for cash on delivery. Does it mean "cash before delivery of *title*" or only "cash before delivery of *possession*"?

When the contract clearly calls for cash on delivery and no delayed time for payment has apparently been contemplated, the preponderance of authority treats the agreement as making payment a condition precedent to delivery.^{39*}

38—Clark v. Greeley, 62 N. H. 394.

39—Can. Nor. R. R. v. No. Miss. R. Co., 209 Fed. 758; Hirsch v. Lumber Co., 69 N. J. L. 509; Hughes v. Knoth, 138 N. C. 105; Ocean S. S. Co. v. So. States Naval Stores Co., Ga., 89 S. E. 383; Peo-

ple's State Bk. v. Brown, Kan., 23 L. R. A. (n. s.) 824; Lentz v. Flint & P. M. Ry., 53 Mich. 444; Hamra Bros. v. Herrell, Mo., 200 S. W. 776; Eaton v. State, 16 Ala. 405, 78 So. 321; Piano Co. v. Piano Co., 85 O. S. 196, "If in such an agreement there is no mention

*See Uniform Sales Act, Section 19, Rule 1. This is the only possible reference to the subject in the act.

But when it is agreed that payment may be delayed for a time after the date of the contract, then, even though the contract stipulates for "payment on delivery", the tendency is to hold that *title* passed according to the usual rules of presumption and only the buyer's right to *possession* is held up till payment.

The term "cash sale" is usually confined in its strictly legal use to transactions in which the court believes that the parties intended payment to be a condition precedent to the passing of title. But in common use, "cash sale" may also refer to an intent of the seller merely to hold possession till payment—to give no credit, although passing title. Because of this double meaning, the term itself means nothing certain, and its use is apt to be misleading.

If it be decided that the parties did in fact intend payment to be a condition precedent to the passing of title, then even the delivery of possession to the buyer does not vest title in him until the expected payment is forthcoming. But the condition precedent of payment may be waived by the seller, and his leaving the buyer in possession for an undue length of time after failure of payment will be looked upon as such a waiver.⁴⁰

of the terms of payment the presumption is that it is a cash sale and that delivery of the goods (i. e., delivery of *title*) and the payment of the price are to be simultaneous".

Intent left to the jury as though it were a question of fact, *Richardson v. Insurance Co.*, 136 N. C. 314; *Boyd v. Bank of Mercer*, 174 Mo. Ap. 431; *Skinner, etc., v. Lemmert Furniture Co.*, 182 Mo. Ap. 549.

A statute of Georgia (Code of 1895, sec. 3546) provides that in a "cash sale" of certain goods title shall be deemed not to have passed till payment. It does not

define "cash sale", but the courts have taken it to mean a stipulation for cash on delivery. See *Charleston R. R. Co. v. Pope*, 122 Ga. 577; *Flanney v. Harley*, 117 Ga. 483.

40—*Frech v. Lewis*, 218 Pa. 141, 11 L. R. A. (n. s.) 948. In this case the question of waiver was held to be one of law for the court and not to be left to the jury. Compare, *Manchester Loco. Wks. v. Truesdale*, 44 Minn. 115 (in equity); *Fishback v. Van Dusen & Co.*, 33 Minn. 111.

Whether there is a waiver or not is a question for the jury, *Osborn v. Gantz*, 60 N. Y. 540.

“**C. O. D.**”—At this place it must be noted that the presumption, that “cash on delivery” means “cash before delivery of title”, does not apply where the stipulation does not appear at the time of making the contract itself, but is stated only when the seller, in shipping the goods to the buyer, has directed the carrier to collect on delivery. This is the usual “C. O. D.” shipment. In general the letters C. O. D. are interpreted as meaning “collect on delivery”, but sometimes as “cash on delivery”.⁴¹ In such case the preponderance of authority treats the stipulation as a condition precedent to delivery of possession only and as not affecting the title.

Two decisions in Missouri exemplify this important difference between a sale for “cash on delivery” and a shipment “C. O. D.” In *State v. Rosenberger*,⁴² there was a sale of goods unidentified at the time of contract but subsequently appropriated by shipment to the buyer. This shipment was “C. O. D.” Nevertheless the court held that only possession was intended to be conditioned on payment and title passed at the time of shipment. In *Johnson-Brinkman Co. v. Central Bank*,⁴³ the plaintiff sold and delivered certain specified property to the buyer. The conditions at the time of sale were “cash on delivery”. As the check given in payment turned out worthless, the court held that there was no payment, that the intention was not to pass title until payment, and therefore that title had not passed.

By what is probably the weight of authority numerically, as well as logically, a C. O. D. restriction on the carrier is held not to rebut the intention to pass title which is ordinarily presumed from the delivery to the carrier. These courts give the C. O. D. instruction an effect consistent with the presumption of intent to pass title, by treating it as a seller’s retention of possession, only, for the sake of his seller’s lien. In *State v. Mul-*

41—*Newhook v. Ryan*, 9 Newf. 220.

42—212 Mo. 648, approved in *State v. Brewing Co.*, 270 Mo. 100.

43—116 Mo. 556.

len,⁴⁴ a resident of a county in which sale of liquor was prohibited, ordered Mullen, a dealer living in a non-prohibition territory, to ship him liquor C. O. D. The defendant did so ship it as ordered and was indicted for making a sale of liquor in the dry county. The court dismissed the charge, on the ground that title passed when the liquor was delivered to the carrier, although by the instruction to the carrier to collect on delivery the seller's right of possession was retained. In *Keller v. Texas*,⁴⁵ the court went so far as to declare unconstitutional a statute of the state which attempted to fix the point of destination of C. O. D. shipments of liquor as the place of sale, on the ground that title really passed, in such cases, at the delivery to the carrier and the statute was an unauthorized interference with the right of persons living in non-prohibition territory, to make sales in that territory.⁴⁶

This holding that shipment "C. O. D." is intended only to leave possession dependent on payment is, as a practical matter, wise, since it gives a very real meaning and effect to the C. O. D. instructions while at the same time adhering to the fundamental proposition that delivery to a carrier shows a *prima facie* intent to pass title. Whether it is wholly consistent with the reasons on which the latter presumption is founded depends upon what those reasons are, and as the courts are anything but explicit concerning the latter we are now practically constrained to accept the rule as one which is wholly reason-

44—78 O. S. 358, 125 Am. St. 710.

45—Tex., 1 L. R. A. (n. s.) 474.

46—A similar statute of Michigan, Sec. 5051, Howell's Statutes, was upheld in *People v. Brewing Co.*, 166 Mich. 292, but the court said that, independent of the statute, the sale, by the weight of authority, would have taken place at the point of shipment. In accord with the general proposition

that a shipment C. O. D. passes title, but retains possession in the seller, are, *Jones v. U. S.*, 170 Fed. 1, 24 L. R. A. (n. s.) 143; *People v. Converse*, 157 Mich. 29; *Pilgreen v. State*, 71 Ala. 368; *State v. Rosengerger*, 212 Mo. 648; *State v. Palmer*, 170 Mo. App. 90; *Keller v. State, Tex.*, 87 S. W. 669; *Tex. Seed, etc., Co. v. Schnoutze*, 209 S. W. 495.

able, but whose precise and original reason for being has been lost.⁴⁷ Furthermore, this rule that "C. O. D." affects possession only gives a very real protection to the seller. It throws on the buyer the risk of loss, makes him liable for the price and yet gives the seller complete protection if the buyer fails to pay. It is precisely what a wise seller ought to mean.

A minority of courts hold, despite the usual rule respecting delivery to a carrier, that an instruction to the carrier to deliver only on payment rebuts the presumption that the shipper intended to pass title. Thus in *State v. O'Neil*,⁴⁸ the facts were essentially identical with those of *State v. Mullen*, *supra*, and the decision quite opposite. Liquor ordered by a resident of Vermont from a firm in New York was shipped to the buyer with C. O. D. instructions. The issue was whether this constituted a sale in New York or in Vermont. The court said that passing of title was a question of intent, and determined the intent in this case not so much as a matter of presumption as one of actuality which could be truly determined from the circumstances. "It is difficult", said the court, "to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent

47—One court however seems to have gone unduly far and to have ignored the real and expressed intent of the parties in favor of the merely constructive presumption. In *Golightly v. State*, 49 Tex. Crim. Ap. 44, 2 L. R. A. (n. s.) 383, the court held that title had passed at

the point of shipment notwithstanding the seller had agreed that the buyer would not have to take the whiskey ordered unless he wanted to, and that it would not be his whiskey until paid for.

48—58 Vt. 140.

by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York; but the completed sale was, or was to be, in this state.'⁴⁹

The answer of other courts to this reasoning is, as has been said, that the illustrations given by the court are all indicative of an intent to retain possession, but not necessarily an intent to retain title. Since retention of possession is in harmony with the usual effect of unrestricted delivery to a carrier, and retention of title is not in harmony, the weight of authority is also the more logical authority.*

In at least one case the intention evinced by a shipment C. O. D. has been treated not as a matter of construction for the court, but as a fact to be left to the jury.⁵⁰

Rebuttal of Presumptions.—As has already been pointed out, these principles of decision are all rules of presumption only, or what may better be called rules of judicial custom, for construing a conventional intention as to title in cases where no real intention is evident. As the real intention, however, is the governing factor in the passing of title, they all give way before any evidence

49—Accord, *E. M. Brash Cigar Co. v. Wilson*, 32 Okla. 153; *Lane v. Chadwick*, 146 Mass. 68; *Henderson v. Lauer & Son*, Cal., 181 Pac. 811, a decision undoubtedly affected by other matters; *Crabbe v. State*, 88 Ga. 584; *State v. Goss*, 59 Vt. 266. See cases collected, both sides, 24 L. R. A. (n. s.) 143,

Note; 2 Id. 383.


It must be remembered that even this minority of decisions does not apply to cases of sales of *specific* property where there was no provision for cash at the time of making the contract.

50—*Com. v. Tynnauer*, 33 Pa. Sup. Ct. 604.

*See Uniform Sales Act, Section 19, Rule 4, (2).

of real intention. Such evidence may take any conceivable form; it may be of any degree of persuasiveness. The same piece of evidence that persuades the court not to follow the conventional rule in one case, may be treated by another court as quite insufficient. These other matters of possible evidence are not, however, sufficiently recurrent for any *custom* of decision based on them to have grown up. When, therefore, a particular case presents facts not precisely covered by the few rules of presumption just discussed, the question of title depends upon the influence of these facts, backed by the persuasiveness of counsel, upon the particular judge. If counsel can find some other case in which similar facts have been judicially held to show a certain intention, the later court may choose to follow the earlier decision—or it may choose to form its own independent conclusion of fact. Undoubtedly particular precedents have some influence, but there is no rule, no established judicial custom, other than those few already stated.

Expressed Intent. — Whenever the parties have *expressed* any intention in respect to the passing of title, there is then no doubt of the matter and title will be held to have passed, or not to have passed, strictly in accord with such intention.

 — **Conditional Sales.**—Of this class are those agreements commonly known as “conditional sales”. These are agreements in which the parties have clearly provided that title shall not pass until the performance of some condition upon the part of the buyer. Usually this condition is payment of the purchase price, but it may be anything.

As between the parties, at least, the courts consistently hold that the legal title does not pass until the condition has been performed. This is thoroughly settled. The seller, however, may waive the performance of the condition, and choose to pass title anyhow, or he may lose his retained ownership in other ways. These mat-

ters, and the rights of the parties generally will be discussed under the subject of "Seller's Remedies".⁵¹ The rights of third persons toward the goods will be discussed under that subject.⁵² The point here pertinent, is simply that, as between the parties, the intention to retain title until performance of the condition will be given full effect.

Conversely, since title can not pass except by mutual agreement, it follows that the buyer's intent must be considered as well as that of the seller. If the facts show clearly that the buyer has not intended to take title, it will not be treated as having passed.⁵³

IDENTIFICATION OF PROPERTY SOLD

So far we have been considering the passing of title to property which is identified by the terms of the agreement at the time it is entered into. Many agreements to sell and buy, however, relate to property having no specific individuality at the time. Individuality, as here used, must not be confused with description. A contract to sell which does not describe the property it refers to is of no effect at all as a binding agreement. No court could determine what kind of property the parties had in mind so as to be able to fix damages in case of its breach. But a description of property, sufficiently clear and definite to give a contract validity, does not necessarily point out any particular property. Thus if A agrees to sell to B the watch which he holds in his hand, or the wheat which is in a certain bin, there is no vagueness as to the specific piece of property considered.

Specification.—On the other hand, a promise by A to sell and B to buy "an Ingersoll watch", or "a thousand bushels of A No. 1 hard, Minnesota grown winter wheat", might be definite enough to form a binding contract.

51—*Post*, p. 99 ff.

52—*Post*, p. 206.

53—See also the discussion of

the seller's right to sue for the purchase price in case the buyer refuses to take title as agreed. *Post*, p. 92.

But the particular watch, or the particular mass of wheat, in respect to which they intend to transfer title would not be known. In a strict sense, of course, a description which tells some characteristics of a thing, but does not give enough of its characteristics to delimit it from all other things is not a complete description. Perhaps such a thing is not, precisely speaking, "described". But, in very common usage, to "describe" a thing is not necessarily to "particularly identify" it. Hence we may properly speak here of "described", but not "particularized" or "identified" property. In the customary law parlance this particular identification is called "specification", and property *described* but not delimited from all other property is "unspecified".

The concept of "ownership" requires not only a person in whom certain rights exist, but a definite and particular object, tangible or intangible, to which those rights relate. There can not be an owner without a thing owned. A thing which is not so described as to have an individuality of its own, apart from all other things of certain like characteristics, has no existence in the eyes of the law. Until there is such a specification as will create individuality of existence there can be no ownership. Consequently, no matter how clearly parties may intend to pass the ownership of something which they describe as "an Ingersoll watch," there is no "ownership" in existence to be passed until they have somehow indicated the particular watch to which they intend the rights of ownership to attach.^{54*}

54—"That the subject thereof must be specific is essential to the validity of every contract of bargain and sale. It inheres in the very nature of the transaction that a bargain and sale can not be made of chattels not yet identified; the ownership cannot change the property or title can not pass,

until the particular property which is the subject of the contract becomes ascertained. This is true independently of the intention of the vendor or vendee." Ellis & Myers Lumber Co. v. Hubbard, Va. 96 S. E. 754.

Dunn v. Georgia, 82 Ga. 27, 3 L. R. A. 199. Sale of liquor was

*See Uniform Sales Act, Section 17.

It follows, therefore, that, under the frequent contracts to buy and sell described, but not then specified, property, no title can possibly pass until the parties shall particularly point out the property in respect to which they are dealing. It logically follows also that the parties must *agree* in thus specifying the particular thing whose ownership one intends to sell and the other to receive.

The cases show a number of settled customs of the courts in deciding whether there has been a specification of property by the seller and an agreement in that specification by the buyer.

—**Specification as Passing Title.**—When the parties have agreed in specifying the particular property which their contract of sale is to affect, there still remains the question of when they intended title to pass. Whatever their intention, it could not have passed until specification. By making the specification did they intend it *then* to pass? These are two distinct issues, subsequent one to the other, to be sure, but independent. Nevertheless

prohibited in D county, but not in F county. The appellant, who had a stock of liquor in F county, agreed with a resident of D county, while both parties were in D county, to sell him a gallon of whiskey. No particular gallon was specified. Appellant was prosecuted for selling whiskey in D county. The court held that the transaction could be nothing but an "executory contract," and not a "sale," until the subject matter of the agreement was identified and that as the identification did not take place in the prohibition county the defendant was not guilty of a sale therein. *Warren v. Buckminster*, 24 N. H. 336, "Where the goods sold are mixed with others, and are not separated from the general stock of the

seller, the sale is incomplete. They must be ascertained, designated or separated from the stock or quantity with which they are mixed, before the property can pass." *Joseph v. Braudy*, 112 Mich. 579; *Mitchell v. Abernathy*, L. R. A. 1917 C. 6; *First Natl. Bank v. Cazort & McGehee Co.*, 123 Ark. 605, 186 S. W. 86; *Taylor v. Fall River Iron Works*, 124 Fed. 826; *Gardiner v. Suydam*, 7 N. Y. 357; *Conrad v. Penna. R. R. Co.*, 214 Pa. 98; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274; *Cassinelli v. Humphrey Supply Co.*, 43 Nev. 208, 183 Pac. 523. "It is common sense that a man can not presently convey title to property which is not in existence," *Gile v. Lasalle*, 89 Ore. 107, 171 Pac. 741.

the courts seldom made a distinction in utterance, and "specification" as meaning "particular delimitation" is much confused with "specification" as meaning "an intent to pass title" to the property then pointed out. As a broad proposition, it may be said that mutual specification of the property to which a contract of sale is meant to apply is taken by the courts as showing a mutual intention to pass title to it at the time of the specification.*

We shall here discuss the matter of mutual specification of the particular property which is to be affected by the contract as a proposition quite apart from the mutual intention to pass title. The former, necessarily, comes first.

—**How Made.**—The natural sequence of events is for the seller to determine upon, and to demonstrate in some way, the particular chattels to which he intends the contract to apply and for the buyer then to express his consent that the contract shall apply to the goods so pointed out. Hence it is usually said that the seller "specifies" the goods and the buyer "assents" thereto. As we have already said, the specification and assent are both necessary before the court can hold that title was intended to pass. This mutuality of intent as to the property to be affected by the contract, that is to say, this specification and assent, together, are usually called the "appropriation" of the goods to the contract. In this sense of the word, to say that goods have been "appropriated" to the contract means that the seller and buyer have agreed in the matter of identification. The word appropriation is, however, quite often used of the act of the seller only, and leaves the assent of the buyer still to be ascertained.⁵⁵ It is necessary to know of this double

55—Cyc. Sales; *Andrews v. Durant*, 11 N. Y. 35; In *Atkinson v. Bell*, 8 Barn. & Cress. 277, the term

is used in both senses; *Wait v. Baker*, 2 Exch. Rep. 1.

*See Uniform Sales Act, Section 19, Rule 4, (1).

meaning to understand some statements by the courts. In this book "appropriation" will be used only of the specification and assent together.

—**May be Implied.**—It is not essential that the specification be in express words. It may be deduced by the court as a clear implication from the circumstances. Any act of the seller, or of the buyer if he is the one to act first, which points out the particular goods to which he intends the contract to apply will be accepted by the courts as a sufficient specification on his part. No particular formality is required. It is the intention of the party, that certain goods shall be the ones affected by the contract, which counts. Anything that clearly demonstrates such an intention is sufficient.

Thus, marking particular goods, conforming to the description of the contract, with the buyer's name is enough to show the seller's intent that those goods shall be operated on by the contract.⁵⁶ A tender to the buyer of certain goods will show it,⁵⁷ or putting goods in the buyer's bottles or sacks.⁵⁸ More often than in any other way, the specification is shown by the seller's delivering certain goods conforming to the contract to a common carrier for transportation to the buyer.^{59*}

Assent to Specification.—But, as has already been said, the seller can not thrust upon the buyer title to whichever goods he, the seller, may choose. No title will be held to have passed until the buyer has assented to

56—*Andrews v. Cheney*, 62 N. H. 404; *Mitchell v. LeClair*, 165 Mass. 308.

57—*Rider v. Kelley*, 32 Vt. 268.

58—*Langton v. Higgins*, 4 Hurl. & Norm. 402.

59—See authorities in subsequent paragraphs.

It would hardly seem to have required a judicial decision to the effect that removal from a mass of all goods not sold specifies the ones which were sold as clearly as would removal from the mass of those which were sold. This was the decision in *Valentine v. Brown*, 18 Pic. (Mass.) 549.

*See Uniform Sales Act, Section 19, Rule 4, (2).

the specification. The necessity of this assent is shown by the case of *Andrews v. Cheney*.⁶⁰ The parties had contracted for the sale of a certain quantity of goods described as being like a sample. Subsequently the seller set apart by themselves certain goods conforming to the description and signified an intent to pass title to them by marking them with the buyer's name. The buyer did not call for them at the time agreed upon and they were subsequently destroyed by fire. The buyer who had paid for them in advance, sued to recover the amount of his payment. The court denied a recovery, on the ground that the seller might still perform his contract by delivering to the buyer other goods conforming to the contract. As to those of which the seller had theretofore shown his intention of passing the ownership according to the contract, the court held title had not passed. "The property in the goods", said the court, "did not pass to the plaintiff by virtue of the contract, for they were not then ascertained, and may not have been in existence. The agreement on the part of the defendant was executory. * * * A contract of sale is not complete until the specific goods upon which it is to operate are agreed upon. Until that is done the contract is not a sale but an agreement to sell goods of a particular description. It is performed on the part of the seller by furnishing goods which answer the description. If, as in the case of a sale of goods by sample, the specific goods are not ascertained by the agreement, the property does not pass until an appropriation of specific goods to the contract is made with the assent of both parties. If the plaintiff authorized the defendant to make the selection, the property immediately on the selection vested in the plaintiff. It not appearing that the plaintiff gave such authority, the goods at the time of the fire were the property of the defendant and their destruction was his loss."

In another case⁶¹ the defendant had agreed to buy from the plaintiff a certain quantity of hops of a described quality to be grown the following year. In due time the hops were raised and tendered to the defendant in conformity with the agreement. He, however, refused to accept them. The plaintiff stored them on the defendant's account and sued to recover the contract price. The court held that he might recover the amount of his damage through the defendant's breach of contract in refusing to accept, but that he could not recover the full amount of the purchase price. On this latter point the court said: "The (lower) court decided that the rule of damages was the contract price which the defendants were to pay for the hops. This rule of damages must stand upon the principle that the vendor in this case, by offering to deliver and tendering to the defendants the hops contracted to be delivered, thereby passed the title to the vendees, so that the hops so tendered became the property of the vendees, and the vendor's title to them ceased, although the vendees refused to accept and did not accept of them. It is to be observed that this is not the case of the sale of the specific article and the tender of it to the vendee. * * * But it is a contract to deliver at a future day property not then *in esse*; property which is to be thereafter produced by the cultivation of the earth, and which is to be of a specified character and description. It comes by analogy within the class of contracts for the manufacture of goods, and for their delivery at a future day. In such cases, the authorities have abundantly established the general rule that the article must not only be made and offered to the vendee, but that he must accept of it, or it must be set apart for him by his consent, before the title to it will vest in him."

An even more severe application of the rule is illustrated by the case of *Greenleaf v. Hamilton*.⁶² The

61—*Rider v. Kelley*, 32 Vt. 268, 76 Am. Dec. 176. 62—94 Me. 113.

defendant had ordered from the publishers one copy of a book called "Men of Progress", for which he agreed to pay \$35. A copy was brought to his office by the publisher's agent and, the defendant being absent, was left there for him. He refused to pay and the assignee of the publisher brought suit for the agreed price. It was held that the plaintiff could not recover the full contract price unless there was an "acceptance" of the book by the defendant, which issue was ordered submitted to a jury.⁶³

—**Implied Assent.**—But the buyer's assent, like the seller's specification, need not be express; it may be implied from acts, or from the circumstances of the case. If he has already seen a larger quantity of goods from which those sold are to be taken, it has been held that he has assented to any selection which the seller may make from that mass, or, in different words, to have made the seller his agent to assent to his, the seller's, own selection.⁶⁴ By sending containers for the seller to fill

63—Buyer's acceptance of seller's specification is necessary to the passing of title; *Moody v. Brown*, 34 Me. 107; *Crowl v. Goodenburger*, 112 Mich. 683; *Greenleaf v. Gallagher*, 93 Me. 549; *River Spinning Co. v. Atlantic Mills*, 155 Fed. 466; *Tufts v. Grewer*, 83 Me. 407, even though article was especially manufactured according to buyer's plans; *Am. Hide Co. v. Chalkley*, 101 Vt. 458; *Johnson v. Hibbard*, 29 Ore. 184, 54 Am. St. 787; *Lovell v. Newman & Son*, 142 Fed. 753; *Hoover v. Maher*, 51 Minn. 269; *Jones v. Jennins*, 168 Pa. 493.

Contra: Title passes on appropriation and tender by the seller without buyer's consent to accept it, *Hyden v. Demets*, 53 N. Y. 426; *Brigham v. Hibbard*, 28 Ore. 386;

Schneider v. O. P. R. R. Co., 20 Ore. 172; *Colorado Springs L. S. Co. v. Godding*, 20 Colo. 249.

Some confusion has been caused by the holding of a number of courts that upon tender of goods conforming to the contract the entire contract price can be recovered whether title has passed or not. This subject is discussed *Pest*, p. 92 ff.

64—*Aldridge v. Johnson*, 7 El. & Bl. 885, "He (the buyer) had inspected and approved the barley in bulk. He sent his sacks to be filled out of that bulk. There can be no doubt of his assent to the appropriation of such bulk as should have been put into the sacks." *Sawyer v. Dean*, 114 N. Y. 489.

he has been held to have made the seller his agent to assent to the seller's specification. Thus in *Langton v. Higgins*,⁶⁵ the buyer of peppermint oil which was still to be manufactured by the seller had sent his own bottles to be filled with the oil as it should be made. The court held that title passed when sufficient oil according to the contract had been put into the bottles, saying, "The buyer in effect says, 'I will trust you to deliver into my bottles, and by that means to appropriate to me, the article which I have bought of you.' On the other hand, the seller must be taken to say, 'You have sent your bottles and I will put the article into them for you.'"⁶⁶

—**Receipt by Carrier.**—The receipt of goods by a carrier for transportation to the buyer is generally held to constitute an assent by the buyer to the seller's specification. The carrier, although it may have contracted for carriage only with the seller, although it may be held not the buyer's agent for purposes of possession, and although it is to be paid by the seller, is nevertheless consistently treated as the buyer's agent to assent to the seller's specification, if that specification does in fact conform to the terms of the contract. It is obvious that there is no real relation of agency between the buyer and the carrier. Although the seller can usually sue for goods sold and delivered, the carrier is not wholly the buyer's agent for purposes of possession, because the seller's right to stop *in transitu* still exists. The carrier is often under contract only with the seller and is to be paid by the seller. The rule is a purely arbitrary one, established for the sake of convenience. In fact there is hardly authority for speaking of agency even as a fiction.

65—4 Hurl. & Norm. 402.

66—The question whether or not the buyer has consented to take the particular thing which the seller has picked out is occasionally left to the jury to decide.

Greenleaf v. Hamilton, 94 Me. 118, but is in general decided by the court, like all other questions of intent in this subject, as a matter of accepted judicial custom.

Rather, the courts have simply decided that appropriation is complete on delivery to a carrier and its acceptance of the goods for carriage, without bothering to state just how the buyer's necessary assent to the specification is worked out.⁶⁷

Passing of Title.—As has already been said, the pointing out of goods as the particular ones to which the contract is to apply, and assent thereto by the other party, has no *necessary* connection with an intent to pass title. It may happen, and does sometimes happen in fact, that the seller points out the particular goods to which he intends eventually to pass title, without intending to pass it at the time. It is possible also that the buyer may consent to the seller's specification of the particular goods that are to pass, without intending to take the title at once.⁶⁸

But it is presumed as a matter of judicial custom unless the contrary appear that by their specification and assent the parties do intend at the same time to pass title. Hence it is said that title is presumed to pass at the instant of complete appropriation. So invariable is this presumption, that courts do not make any verbal distinction between specification and intent to pass title, or between assent and intent to accept title, and frequently use one in the sense of the other.

—Delivery to Carrier.—The delivery of goods to a carrier for transportation to the buyer, therefore, not only constitutes an act of specification, but is presumed also to show an intent to pass the title to the goods so specified. Conversely, the receipt by the carrier demon-

67—See the authorities and discussion in the following paragraphs.

68—Wait v. Baker, 2 Exch. Rep. 1, "The word (appropriation) may mean that both parties have

agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case." Schreyer v. Kimball Lumber Co., 54 Fed. 653.

strates both the buyer's assent to the specification and his intent to receive the title.

The theory on which this holding is based is anything but clear. The courts usually dismiss the proposition with the simple statement that the carrier is the buyer's agent to accept the goods, or that delivery to the carrier is delivery to the buyer. If by "delivery" and "acceptance" in this connection the courts mean physical delivery, or acceptance of possession of the tangible chattel, there is an obvious inconsistency with the proposition that by a C. O. D. shipment title passes to the buyer but the possession is retained by the seller.⁶⁹ Neither does the idea of possession in the buyer, through the carrier as his agent for that purpose, conform to the holdings that delivery to a carrier is not delivery to the buyer so as to satisfy the requirements of the Statute of Frauds.⁷⁰

If on the other hand they mean delivery of the title—the concept of ownership as distinct from the tangible thing to which it applies—and its acceptance by the carrier as the buyer's agent, the inconsistency disappears. It is perfectly conceivable that the carrier may be both the buyer's agent to receive title and the seller's agent to hold physical possession. This theory is not contradicted by anything in the cases nor inconsistent with their verbiage, and it comes nearer to harmonizing the various holdings than any other, but it must be pointed out that if it be the underlying principle it is not expressly stated by the courts. The courts, as a matter of fact, appear to accept the rule that receipt of the goods by a carrier constitutes an acceptance of title by the buyer, without feeling called upon to discuss the reason. The case of *Johnson v. Hibbard*⁷¹ is characteristic. The court says, "In the sale of articles or goods to be

69—See discussion of C. O. D. shipments, *ante*, p. 35.

70—*Gatiss v. Cyr*, 134 Mich. 233.

See discussion under that subject, *post*, p. 269.

71—29 Ore. 184, 54 Am. St. 787.

manufactured, it is clear that no title passes until their manufacture is completed, and they, by the understanding and consent, express or implied, of the parties to the sale, have been selected or designated, and set apart to the purchaser." This statement that mutual consent is necessary to the passing of title is followed by the simple statement, without discussion, that title passed when goods conforming to the contract were delivered to the carrier. Just how delivery to the carrier shows the buyer's necessary consent the court does not say.^{72*}

In *Harper v. State*,^{27a} the facts were that a minor living outside the state had written Harper, a resident of Arkansas, to send him a gallon of whiskey. Harper shipped it consigned to the buyer, who duly received it. An Arkansas statute made it unlawful to sell liquor to a minor and Harper was indicted thereunder. He defended on the ground that there was no such statute in the buyer's state and that title had not passed until delivery by the carrier to the buyer, which had occurred outside of Arkansas. The court held the indictment to be good because the sale had been executed, that is, title

72—Title passes on delivery to carrier. *Dunn v. Georgia*, 82 Ga. 27, 3 L. R. A. 199; *Hill v. Fruita Mercantile Co.*, 42 Colo. 491, 126 Am. St. 172; *A. J. Neimeyer Co. v. Burlington R. R.*, 54 Neb. 321, 40 L. R. A. 534; *Sullivan v. Sullivan*, 70 Mich. 583; *Branch Saw Co. v. Bryant*, 174 N. C. 355, 93 S. E. 839; *Third Natl. Bk. v. Smith*, 107 Mo. 178; *Dr. A. P. Sawyer Medicine Co. v. Johnson*, 178 Mass. 374; *Presley Fruit Co. v. St. Louis, etc. R. R.*, 130 Minn. 121, 153 N. W. 115; *The Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Congdon v. Kendall*, 53 Neb. 282; *Hawens v. Grand Island L. & F. Co.*, 41 Neb. 153;

Kleine v. Baker, 99 Mass. 253; *Harper v. State*, 91 Ark. 422, 25 L. R. A. (n. s.) 669; *State v. J. W. Kelley & Co.*, 123 Tenn. 556, 36 L. R. A. (n. s.) 171; *Loveland v. Dinunan*, 81 Conn. 111, 17 L. R. A. (n. s.) 1119; *Dentzel v. Island Park Assn.*, 229 Pa. 403, 33 L. R. A. (n. s.) 54; *Tyler Co. v. Ludlow Co.*, 236 U. S. 723; *State v. Gruber*, 116 Minn. 221, 45 L. R. A. (n. s.) 591; *Twitchell-Champlin Co. v. Radovsky*, 207 Mass. 72; *White v. Schweitzer*, 132 N. Y. S. 644, 147 App. Div. 544, citing *Dutton v. Solomonson*, 3 Bos. & Pul. 582.

72a—91 Ark. 422, 25 L. R. A. (n. s.) 669.

*See Uniform Sales Act, Section 19, Rule 4, (2).

had passed, when the liquor was shipped, consigned to the buyer.^{72b}

A repudiation of the contract by the buyer is held to be a revocation of the carrier's authority to receive the goods for him. Consequently a subsequent specification of goods by the seller and delivery of them to a carrier for transportation to the buyer does not vest title in the buyer. As one court puts it⁷³ "the direction not to ship was a revocation of the carrier's agency to receive, and the plaintiffs (sellers) thereby had notice of the revocation. The delivery of the goods to the carrier, therefore, was unauthorized, and the carrier's receipt would not charge the defendant".⁷⁴

72b—Hill v. Fruita Mercantile Co., 42 Colo. 491, 126 Am. St. Rep. 172; A. J. Neimeyer Co. v. Burling-ton R. R., 54 Neb. 321, 40 L. R. A. 534; Sullivan v. Sullivan, 70 Mich. 583; Branch Saw Co. v. Bryant, N. C., 93 S. E. 839; Third Natl. Bk. v. Smith, 107 Mo. 178; Kleine v. Baker, 99 Mass. 253; State v. J. W. Kelley & Co., 123 Tenn. 556, 36 L. R. A. (n. s.) 171; Loveland v. Dinnan, 81 Conn. 111, 17 L. R. A. (n. s.) 1119; Dentzel v. Island Park Assn., 229 Pa. 403, 33 L. R. A. (n. s.) 54, in the absence of any countervailing evidence trial court should give binding instructions to this effect to jury. Tyler Co. v. Ludlow Co., 236 U. S. 723, infringement of patent by sale of articles occurs in the district in which the articles are shipped to buyer and in no other; State v. Gruber, 116 Minn. 221, 45 L. R. A. (n. s.) 591.

The presumption has been changed by statute in South Carolina so far as shipments of intoxicating liquor are concerned and an arbitrary rule as to the place of sales substituted for it. Sec. 2080, Revisal of 1905. This statute sim-

ply provides that the place of delivery of intoxicating liquor within the state "shall be construed and held to be the place of sale thereof". A similar statute was enacted in Texas—Acts of 1901, p. 262—providing that when intoxicating liquor was shipped with a collection on delivery provision the sale should be deemed to have occurred at the place of destination. This act was held unconstitutional on the ground that by the common law presumption the sale took place at point of shipment and the legislature could not, even indirectly, prevent the owner from bringing into a dry county liquor of which he had acquired title in another county. Keller v. State, Tex. Crim. Ap., 1 L. R. A. (n. s.) 489.

73—Unexcelled Fire-works Co. v. Polites, 130 Pa. 536.

74—Lincoln v. Chas. Alshuler Mfg. Co., 142 Wis. 475; Lipper Mfg. Co. v. Morris & Co., 58 Pa. Superior Court 611, but holding that buyer's acceptance of them from the carrier and unexplained

The authority of the carrier or other agent to assent for the buyer to the passing of title, or to accept delivery of the goods so as to pass the title (whichever theory be chosen) is limited to cases where goods conforming to the contract are offered. This "agency" of the carrier to receive the goods or the title is of course a mere fiction. As a matter of fact a carrier would receive any goods that the seller might deliver to it for transportation to the buyer. There is no pretense that the carrier examines them to see whether they conform or not to the terms of some contract of sale. The agency of the carrier is merely a legal construction apparently based on expediency and operating to avoid conflict with the rule that title can not be forced upon the buyer without his consent to accept title in the particular chattel to which the seller has chosen to pass title.

This constructive agency, however, extends only to the acceptance of goods which conform to the contract. Delivery by the seller to a carrier and its receipt of goods which do not conform to the terms of the contract do not suffice to pass the title. Before title will pass in such case there must be some further evidence of acceptance by the buyer of the particular goods presented.^{75*}

The delivery to a carrier of goods which the seller asserts conformed to the description in the contract is *prima facie* evidence of specification and assent and consequent passing of title. The burden is then upon the

retention amounted in itself to acceptance of title; *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L. R. A. (n. s.) 807.

75—*Johnson v. Hibbard*, 29 Ore. 184, 54 Am. St. 787; *Nomordust Co. v. Eberts & Co.*, 59 Pa. Sup. Ct. 295; *Fogel v. Brubaker*, 122 Pa. 7; *Skinner v. Griffiths*, 80 Wash. 291, 141 Pac. 693; *Downer v. Thompson*, 2 Hill (N. Y.) 137, de-

livery to carrier of a greater quantity than called for by the contract; but same case, 6 Hill 208, to effect that an actually intended gift of the excess would pass title to the whole; compare, *The Iron Cliffs Co. v. Buhl*, 42 Mich. 86.

Hoover v. Maher, 51 Minn. 269, delivery to carrier before the time stipulated by the buyer for shipment does not pass the title.

*See Uniform Sales Act, Section 44, (1), (2), (3), (4).

buyer to prove that the goods so specified by the seller did not in fact conform to the terms of the agreement. If the goods had been destroyed while in the carrier's hands this proof would of course be difficult to make and it is probable that the seller's *prima facie* proof would remain un rebutted.⁷⁶

—**Other Circumstances.**—Various other circumstances have, by particular courts, been held presumptively to show an intent to pass title. The circumstances are not sufficiently recurrent to give rise to a *rule* of presumption and the cases are therefore of value only as showing the general trend of judicial idea as to what indicates intent to pass title. This intent has been presumed from the manufacture of goods and their delivery to a particular storage house agreed upon by the parties,⁷⁷ from the seller's putting property conforming to the contract into the buyer's sacks⁷⁸ or into bottles belonging to the buyer.⁷⁹ The delivery of goods conforming to the contract to persons, other than a common carrier, to whom delivery has been authorized by the buyer has been held to pass the title, although the buyer had not in any other way signified his acceptance of those particular goods.⁸⁰

These conclusions are only inferences of intent based upon the facts, and this judicial assumption of probable intent may be overthrown by any evidence of a real intent in conflict therewith. That is to say, no facts are conclusive, as a matter of law, in showing the intent of the parties. Even the rule that delivery to a carrier shows a probable and presumptive intent to pass title is

76—*Nomordust Co. v. Eberts* Co., 59 Pa. Sup. Ct. 295; *Skinner v. Griffiths*, 80 Wash. 291, 141 Pac. 693; *Levy v. Radkay*, 233 Mass. 29, 123 N. E. 97.

77—*Stewart v. Henningsen Produce Co.*, 88 Kan. 521, 50 L. R. A. (n. s.) 111.

78—*Aldridge v. Johnson*, 7 El. & Bl. 885.

79—*Langton v. Higgins*, 4 Hurl. & Nor. 402.

80—*Stewart v. Henningsen Produce Co.*, 88 Kan. 521, 50 L. R. A. (n. s.) 111; *Skinner v. Griffiths*, 80 Wash. 291, 141 Pac. 693.

rebuttable by any evidence that sufficiently clearly shows an intent not to pass title. The counter evidence may, of course, take as many forms as the circumstances of the case are capable of assuming.

—**Taking Out Bill of Lading.**—Anything showing for which party the carrier is expected to act as bailee would logically be indicative of intent as to title. That is to say, a seller desiring to retain ownership would not naturally make the carrier bailee for the buyer. But if he intended to pass title he would naturally make the carrier the buyer's bailee rather than his own. Whether this be the reason on which courts have decided or not, the fact is that when, on shipment, a bill of lading is taken from the carrier by the seller, the fact that he takes it in his own name, so that the carrier becomes his own bailee, is treated by the courts as strong evidence that he intended to retain title despite the shipment.*

If the seller takes the bill in his own name as bailor, that fact in itself is held enough to rebut the presumption that in shipping the goods he intended to pass title.⁸¹

Taking a bill of lading in the name of an agent of the seller, or consigning to an agent instead of to the buyer also logically indicates an intent not to pass title to the

81—*W. T. Wilson Co. v. Central Natl. Bk.*, Tex. Civ. Ap., 139 S. W. 996; *Dows v. National Exch. Bk.*, 91 U. S. 618; *Rylance v. Walker Co.*, 129 Md. 475; *Jenkyns v. Brown*, 14 Q. B. Rep. 496; *Denfield Onion Co. v. N. Y., N. H. & H. R. R.*, 222 Mass. 535; *Alderman v. Eastern R. R.*, 115 Mass. 233; *Armstrong v. Coyne*, 64 Kan. 75, 67 Pac. 537; *Willman Merc. Co. v. Fussy*, 15 Mont. 511, 39 Pac. 738; *Sheperd v. Harrison*, L. R. 5 H. L. 116; *Wait v. Baker*, 2 Exch. Rep. 1, even though freight was to

be paid by the buyer; *Wigton v. Bowley*, 130 Mass. 252; *Emery's Sons v. Irving Bk.*, 25 O. S. 360; *Douglas v. People's Bk.*, 86 Ky. 176; *Security State Bk. v. O'Connell Lumber Co.*, 64 Wash. 506, 117 Pac. 271; *Ward v. Taylor*, 56 Ill. 494; *Gilbert v. Ayoob*, 71 Pa. Sup. Ct. 336; a bill of lading in the shipper's own name "is inconsistent with an intent to pass the ownership of the cargo", *Henderson v. Lauer & Son*, 40 Cal. Ap. 696, 181 Pac. 811.

*See Uniform Sales Act, Section 20, (1), (2), (3).

buyer and has been so held. In *Berger v. State*,⁸² Berger while in a county where sale of liquor was prohibited took an order for liquor from C. He transmitted this to L, a dealer in a wet county, who packed liquor conforming to the order and put C's name on the bottle, but shipped it by carrier to Berger. The latter delivered it to C and was thereafter prosecuted for selling liquor within the dry territory. The court said that if the shipment had been direct to C title would have passed on delivery to the carrier outside the dry territory, but that by consigning it to his agent the seller evinced an intent to retain title and that, therefore, the sale took place when Berger delivered the liquor to C.⁸³

Taking out a bill in the name of the buyer would not, of course, have this effect, but tends rather to strengthen the presumption that by delivery to the carrier the seller intended to pass the title.⁸⁴

The courts have gone so far in giving consideration to the indication of intent shown by the bill of lading as to hold that even shipment on the buyer's own vessel with a statement that, as to payment of freight, the goods were buyer's property did not show an intent to pass title to the buyer when the bill of lading had been taken out in the seller's name.⁸⁵

82—50 Ark. 20.

83—Accd., *Zimmerman's Coal Co. v. L. & N. R. R.*, 6 Ala. Ap. 475, 60 So. 598.

84—*Georgia Marble Works v. Minor*, Ark., 193 S. W. 498; *Bailey v. H. R. R. Co.*, 49 N. Y. 70; *Buckeye Cotton Oil Co. v. Mathe-son*, 89 S. E. 478; *Bk. of Litchfield v. Elliott*, 83 Minn. 469, 86 N. W. 454; "Delivery of the goods to the carrier together with the taking of a non-negotiable bill of lading in the name of the defendant (buyer) was strong proof of intention by the plaintiffs to trans-

fer the title to the defendant". *Edelstone v. Schimmel*, 233 Mass. 45, 123 N. E. 333.

85—*Turner v. Trustees*, 6 Exch. Rep. 543; *Ellershaw v. Magniac*, 6 Exch. Rep. 569; In *Gabarron v. Kreeft*, L. R. 10 Exch. 274, the seller was under contract to deliver to the buyer the particular goods shipped, and the vessel had been chartered for the purpose of carrying them to the buyer. Nevertheless it was held that title did not pass to the buyer on shipment because the bill of lading was taken in the name of a fictitious agent of the seller.

While the majority of cases indicate clearly that the seller in taking the bill of lading in his own name is presumed to have retained title, there are occasional decisions holding apparently that he retains a lien, a right of possession, only.* Thus in *Mirabita v. Imperial Ottoman Bank*⁸⁶ the buyer was allowed to bring an action in damages, based on *title* rather than contract, despite the fact that the bill of lading was in the seller's name and he had thereby retained a "*jus disponendi*". The court, however, avoided discussion of whether the seller's right was really title or not. In effect, therefore, it is confusing.⁸⁷

A seller's consignment to himself, without bill of lading, makes the carrier bailee of the seller and has been held not to indicate any intent to pass title.⁸⁸ And a consignment to one who has never agreed to buy can not, of course, whatever be the shipper's intent, pass the title to him, for the reason that he has never consented to receive title and the carrier is not even by a fiction his agent to receive it.⁸⁹

In *Falk v. Fletcher*,⁹⁰ goods had been delivered to a carrier for transportation with expectation of taking a bill of lading of some sort. Before a bill could be taken out the master of the vessel sailed away with the goods. The court left it to the jury to determine what the shipper's intention as to title was.

——**Rebuttal of Evidence of Bill of Lading.**—The rebuttal of presumptive intent to pass title by delivery to a

86—3 Exch. Div. 164.

87—*Cf.*, *Sawyer v. Dean*, 114 N. Y. 469; but in *Ullman v. Wormer Mach. Co.*, 210 N. Y. 41, where previously unspecific goods were shipped to the seller's own order, the court said, "The title to the machine never vested in the defendant (buyer)."

88—*Newcomb v. Boston & Lowell R. R.*, 115 Mass. 230; *Furman v. Un. Pac. R. R. Co.*, 106 N. Y. 579, but it does not appear definitely that there was even a contract to sell in this case.

89—*Allen v. Williams*, 12 Pick. (Mass.) 300; *Dunn v. State*, 48 Tex. Crim. 107, 122 Am. St. 734.

90—34 L. J. R. C. P. 146.

*See Uniform Sales Act, Section 20, (1), (2), (3).

carrier, which follows from taking the bill of lading in the seller's own name, is itself rebuttable if other facts warrant a different conclusion. It must be borne in mind that the real intent of the parties governs the passing of title. It passes when they so intend and not until they intend. The various presumptions which the courts have established are not rules of title, but presumptions pure and simple, which will prevail in the absence of any other evidence of intent, but which will give way at once to any evidence whatever which is sufficient to convince the particular court or jury that the real intent of the parties was not in accord with the presumption.

A good illustration is found in the case of *Lovell v. Newman & Son*.⁹¹ K. & Co. having contracted to sell cotton to a certain spinning company, forged bills of lading made out in their own name for a pretended shipment of cotton conforming to the contract. These bills of lading they sent to the spinning company and collected the agreed price of the cotton. Later they did actually ship cotton, the genuine bills for which were also in the shippers' name and were identical with the forged ones. K. & Co. were adjudged bankrupt and these bills of lading were found among its papers by the trustee in bankruptcy. He brought suit against the bondsman of the carrier, claiming the title to be in him as trustee. The court held that taking the bills of lading in the seller's own name gave rise to a presumption that they intended to retain title, but that this presumption was rebutted by the circumstance that the real bills were taken out in form identical with the forged ones by delivering which K. & Co. had pretended to pass title to the buyers.

In *Valley v. Montgomery*,⁹² the bill of lading had been taken out in the seller's name. Lord Ellenborough said he would have been inclined to hold that title had not

⁹¹—188 Fed. 534, 113 C. C. A. ⁹²—3 East 585.
³⁹; affirmed 192 Fed. 753.

passed to the buyer except for the fact that an invoice for the goods had been sent to the buyer stating that the goods were shipped at his risk and that the throwing of the risk on the buyer indicated an intent to pass the title to him. By way of illustrating the effect of evidence on different courts and demonstrating that the decision is one of individual conclusion, not a rule, in *Martineau v. Kitching*,⁹³ where the question of intent as to passing of title was in issue, there was an express stipulation that the risk of loss should remain in the seller. The court held this to indicate an intent that title should be in the buyer because if the seller had been intended to retain title the risk would have been in him without stipulation.

In *Dows v. Natl. Ex. Bk.*⁹⁴ the sending of an invoice to the buyer, without any provision in it as to risk, was held not to rebut the "almost conclusive presumption" of intent to retain title raised by taking the bill of lading in the shipper's own name.⁹⁵

Subsequent dealing with the bill of lading itself as passing the title is discussed hereafter.

—**Other Circumstances.**—Just as the presumption, that intent to pass title is evidenced by delivery of goods to a carrier, may be rebutted by the taking of a bill of lading in the shipper's own name, so it may be rebutted by other circumstances. It would be of no purpose to point out many of the various circumstances which have been held in one case or another to rebut such presumption of intent, but for particular precedents which may possibly

93—L. R. 7 Q. B. 436.

94—91 U. S. 618, 630.

95—In *Ogle v. Atkinson*, 5 Taunton 759, it was held that title passed on delivery to the carrier, despite the fact that the bill of lading was taken in the seller's name, because of statements and

actions on the part of the seller so indicating. In *Golightly v. Texas*, 49 Tex. Cr. Ap. 44, 2 L. R. A. (n. s.) 383, an oral stipulation that buyer should assume no risk of loss in transit was held not to rebut presumption that title passed on shipment.

have persuasive effect upon a court reference must be made to the digests.⁹⁶

—**Conflicting Intents.**—The rule of evidence that a presumption of intent existing at the time of certain acts can not be rebutted by a showing of subsequent acts or declarations, or other subsequent evidence, prevails of course in this relation. The delivery of goods to a carrier and the taking out of a bill of lading, or giving other directions as to shipment, are all a part of the one transaction of shipment. It is not the deposit of goods in the carrier's freight house that demonstrates the parties' intent as to title, but the "shipment" which shows it. But when the presumptive intent has been shown by this shipment, it can not thereafter be rebutted by the subsequent acts of the parties, although, of course, they may if they choose *actually* alter their prior intent.⁹⁷

It follows also that if title has already presumptively passed to a specific chattel, the way in which the seller deals with it on shipment will not serve to revest title in him, nor to rebut the already existing presumption.

—**Partial Delivery.**—In cases where the contract is for the sale of a quantity of unspecified goods and a part of them have been specified and accepted by the buyer the question sometimes arises whether title has passed to so much as has been specified. If the contract is decided to be a "severable" one, so that title to the various parts and amounts of the goods contracted for may be treated separately from that of the whole, the issue would properly be determined just as it would be in any contract

96—Moakes v. Nicholson, 34 L. J. R. C. P. 273; not rebutted by bill "on account of whom it may concern" but invoice to buyer. The Carlos F. Roses, 177 U. S. 655, 662.

97—Alderman Bros. Co. v. Westinghouse, etc., Co., 92 Conn. 419.

A contrary *dictum* is found in Presley Fruit Co. v. St. Louis, etc. R. R., 130 Minn. 121, 153 N. W. 115, to the effect that seller's retention of a bill of lading in the buyer's name might show an intent to retain title.

for the sale of the particular goods actually delivered, without considering the fact that they were part of a larger amount. But if the contract be looked upon as an entirety, a different state of facts is present. It is highly probable that the buyer and seller did not contemplate the passing of title to part only, but rather that no real ownership to any part should pass until the ownership of the whole should be transferred. The authority on this point is extremely limited. In *Thompson v. Conover*,⁹⁸ it was explicitly held that title would pass. Conover had sold to Petty certain corn, to be shelled by the seller and delivered. A part of it was so delivered and accepted, and the rest, upon subsequent delivery, was refused by the buyer. That which had been delivered was levied upon by the sheriff as the property of the buyer. Conover then rescinded the contract and brought his action in trover. The court held the contract to be *entire* and the seller to have a right to rescind for the buyer's non-performance. But it held also that the action of trover could not be maintained because the title had passed from Conover to the buyer.⁹⁹

On the other hand, it has been intimated, without the necessity of so holding, that title to part delivered under a contract for an entire quantity would not pass until the whole amount had been appropriated.¹⁰⁰ Other cases, without discussing whether title to the part did pass or not, have held that it is in the seller after rescission at any rate.¹⁰¹ Of course the facts of the case may be such as to show that the parties intended the *risk of loss* of so much as had been appropriated to be upon the buyer, regardless of whether or not title had passed to him.¹⁰²

98—32 N. J. L. 466.

99—*Holland v. Cincinnati Co.*, 97 Ky. 454, title held to have passed and not to revert upon rescission, but it was not definitely held that the contract was entire.

100—*Stewart v. Henningsen Produce Co.*, 88 Kan. 521, 129 Pac. 181; *Walti v. Gaba*, 160 Cal. 324, 116 Pac. 963.

101—*Pope v. Porter*, 102 N. Y. 366.

102—*Anderson v. Morice*, L. R. 10 C. P. 609.

—**Dealing with a Bill of Lading.**—Although the fact that by taking a bill of lading in the seller's name the carrier is made bailee for the seller raises a presumption that title was not intended to pass, this bill of lading itself may later be so dealt with as to show an intent to pass title to the goods represented by it to the buyer. Dealing with the bill of lading has the same effect that dealing with the goods themselves would have. Therefore when the seller indicates an intent to pass the ownership of the bill of lading to the buyer he manifests also an intent to pass title to the goods represented by the bill of lading. The usual case is an indorsement of the bill of lading and its delivery to the buyer. The fundamental case upon this point is *Lickbarrow v. Mason*, decided in 1793.¹⁰³ This case arose out of a sale of unspecified goods by Turing & Son to Freeman. Pursuant to the contract, Turing shipped corn consigned to Freeman and took the bills of lading in his own name. Two of these bills, which were in quadruplicate, Turing indorsed in blank and sent to Freeman. The latter transferred them to the plaintiff as security for an obligation. Freeman having become insolvent before arrival of the goods, Turing, through the defendant as his agent, attempted to retake possession as an unpaid seller. The Exchequer Chamber held that the title to the goods remained in the seller; that the buyer Freeman, having no title, could convey nothing to the plaintiff, even by endorsing to him a bill of lading. On review by the House of Lords it was held that by the assignment of the bill of lading the legal title had passed to Freeman and from him to the plaintiff, and that the plaintiff having an equity in addition to his legal title, the seller's merely equitable right could not prevail. It was further specifically held that the transfer of the bill of lading by an indorsement in blank had the same effect of transferring the legal title,

103—2 T. R. 63; 1 H. Blackstone 357, 2 Id. 211; 5 T. R. 683.

if so intended, as by indorsement to a particular person named. So, it is now consistently held that transfer of a bill of lading has the same effect as transfer of the goods represented by it would have.¹⁰⁴

This transfer of the bill of lading, like the delivery of goods, may be made upon condition. If it is transferred upon condition and the seller, i. e., the transferor, does not intend title to pass until the condition is fulfilled, title does not pass—as between the parties—until then.^{105*}

Unspecified Part of Specified Mass.—An agreement to sell property which is itself unidentified, but which is described as part of a definite and specified larger mass of goods, is a common transaction. The question then arises whether the buyer has any of the privileges and liabilities of ownership in respect to the mass before some particular part has been designated. It is obvious, of course, that he can not be the owner of any physically limited or separated part until such particular part has been specified. Even if by the agreement he is bound to accept, or if he has authority to select for himself what part he will take, until such selection has actually been made he is not the owner of any particular part, but has only a legal right *to become* the owner of some particular part. As we have already pointed out, ownership is not a mere idea, but is the legal connection of certain ideal rights and duties with some particular, definite thing. Until there is a definite thing to be the object of ownership there is no ownership. And while the thing described as sold is still an undetermined part of something else, there is no definite thing to be owned.

It is, however, a legal concept that several persons may have certain rights and duties of ownership in respect to the same one particular thing. When the legal rights

104—See *post*, p. 219, 221, for full discussion. 5 H. of L. 116; *Godts v. Rose*, 25 L. J. R., C. P. 61; *Wait v. Baker*,

105—*Shepherd v. Harrison*, L. R. 2 Exch. Rep. 1.

*See Uniform Sales Act, Section 34.

which go to make up the concept of ownership were predicated upon the fact of physical possession, it is true that "ownership" by more than one person of a single chattel would have been more or less paradoxical. Philosophically it is perhaps demonstrable that two persons can not simultaneously "possess" a single thing any more than two spaces can be simultaneously occupied by it.¹⁰⁶ But rights and obligations are no longer founded on actual physical possession. The history of the change would be out of place in a work of this type and it is sufficient to say that several persons may have a co-ownership, an "ownership in common" in a single thing.

Although one who owns a thing obviously can not invest another with rights in respect to a particular part of that thing until he indicates in some way the part to which the new rights shall apply, nevertheless the owner of a thing can invest another with rights in respect to the entire thing without thereby necessarily divesting himself of all rights. So long as we know with what rights and liabilities he has invested the second person, it is immaterial by what name they be collectively called. Usually the courts do speak of them as rights of "ownership in common". The transaction is usually called a "sale" and the buyer is said to become an owner or tenant in common.^{107*}

106—For a discussion of the difference of ideas as to concurrent possession and ownership of land and of chattels see Pollock & Maitland, Vol. 2, p. 180 ff.

107—Loomis v. O'Neal, 73 Mich. 582; In Kimberly v. Patchin, 19 N. Y. 330, the court held that the buyer of an undistinguished number of bushels of a larger mass of wheat acquired an ownership, but said that it was something more than a tenancy in common; Lobbell

v. Stowell, 51 N. Y. 70, something more than tenancy in common.

As to the rights themselves, regardless of their name as ownership, or otherwise, it has been held that one in whom the owner has created an interest in an unspecified part of a mass of grain, or other fungible goods, may maintain *assumpsit* against the original owner. Loomis v. O'Neal, 73 Mich. 582, "The refusal to recognize the right of the co-tenant

*See Uniform Sales Act, Section 6, (1), (2), 76, "Fungible goods."

—**Intent of Parties.**—It thus appears that the law recognizes a possibility that rights or liabilities such as usually connote ownership may exist coincidentally in two or more persons in respect to a single undivided mass of property. The only question to be solved, therefore, is whether the sale of a certain quantity of a larger mass is *intended* by the parties to transfer such an “undivided ownership” in the whole mass.

It does not matter what the rights should be called, the question is whether the parties have intended that the buyer shall have rights in respect to the whole mass

amounts to a conversion. The tort may be waived, and *assumpsit* brought”; or may have an action against the other for damages for conversion, *Lobdell v. Stowell*, 51 N. Y. 70; *Kimberly v. Patchin*, 19 N. Y. 330; or an action of trover, *Stall v. Wilbur*, 77 N. Y. 158.

It has even been held that a “tenant in common” may bring replevin for his own part, the court saying, “It has been quite generally held that tenants in common or persons who are separate owners of articles stored in mass, such as corn, wheat, coal, logs, etc., each article being of like nature and quality with the others, may have replevin for his proportionate part of the intermixed chattels if the same is wrongfully detained and the action is necessary for the maintenance of his rights, subject to deductions for any loss or waste properly falling to his share while the property remained in mass.” *Manti City Savings Bank v. Peterson*, 33 Utah 209, 126 Am. St. 817, 93 Pac. 566; *Piazek v. White*, 23 Kan. 621, 33 Am. Rep. 211; *Halsey v. Simmons*, 85 Ore. 324, 166 Pac. 944.

As recognizing the possibility of rights in respect to one particular thing in two persons simultaneously, see *Gardiner v. Suydam*, 7 N. Y. 357; *Seldomridge v. Bank*, 87 Neb. 531, 127 N. W. 871; 30 L. R. A. (n. s.) 337; *Brownfield v. Johnson*, 128 Pa. 254, 6 L. R. A. 48, *dictum*. “The weight of American authority supports the proposition that when property sold to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent.” *Kimberly v. Patchin*, 19 N. Y. 330, “None of (the decisions) go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of a quantity without actual separation, where the mass is ascertained by the contract and all parts are of the same value and undistinguishable from each other.” *Tobin v. Portland Mills Co.*, 41 Ore. 265, depositors of wheat in a warehouse called “tenants in common thereof, having such an undivided interest therein as the quantity stored by each bore to the amount deposited.” *Bretz v. Diehl*, 117 Pa. 589.

itself, as distinct from mere rights of action against the seller personally.¹⁰⁸

—**Presumption of Intent.**—The intention to create rights to the property itself need not be expressed. The courts may conclude such to have been the intention from an examination of the circumstances. In *Hurff v. Hires*¹⁰⁹ it appeared that Hurff had bought from Heritage 200 bushels of corn which was part of a mass of 400 or 500 bushels belonging to Heritage. Nothing whatever appears to have been said in regard to legal rights or liabilities. Before there was any separation of the corn sold from the mass, Hires, a sheriff, levied upon the whole mass as being the property of Heritage. Despite the levy Heritage separated 200 bushels from the mass and delivered it to Hurff, and Hires brought an action of trover. The lower court decided in favor of the sheriff “on the theory that though the purchaser bought the corn and paid the price, the title did not pass to him, because the quantity sold was not separated from the original bulk until after levy, and that therefore the whole still remained liable to seizure as the property of the vendor.” This holding was reversed by the Supreme Court, which said, “It is the general rule that the property in goods and chattels passes under the contract of sale according to the intention of the parties. The difficulty in the application of this rule is in determining under what circumstances the parties shall be considered as having evinced an intention that property in the subject-matter of sale should pass from the vendor to the

108—It must be borne in mind that if the sale is merely of certain property, described, but not identified even to the extent of being part of a larger definite mass, no title, even an undivided one, can pass. It is impossible to conceive of even an ownership in common in a mass unless the

mass itself is known. Many cases turn in reality upon lack of identity of even a larger mass from which property sold is to be taken, although they appear on casual reading to hold that title in common could not pass.

109—11 *Vroom*. (N. J. L.) 581, 29 Am. Rep. 282.

purchaser." After pointing out that intention to pass title is found readily or reluctantly according to the degree of protection thought due the seller, the court continued, "The tendency of modern decisions is to give effect to contracts of sale according to the intention of the parties to a greater extent than is found in the older cases, and to engraft upon the rule that property passes by the contract of sale, if such be the intention, fewer exceptions, and those only which are founded upon substantial considerations affecting the interest of parties." The court held accordingly that there was no legal reason why an ownership of the corn itself could not have passed to the buyer even before separation of the mass and that *the question as to whether the parties so intended should have been left to the jury.*

In *Kimberly v. Patchin*,¹¹⁰ an intent to pass an actual ownership by the sale of 6,000 bushels of grain out of a mass of 6,240 was deduced by the court—without reference to a jury—from the fact that the owner not only gave a bill of sale for 6,000 bushels but thereafter stated in writing that he held 6,000 bushels of grain as bailee of the buyer.

Where there are no particularly indicative facts, except the fact that the sale is of part of a mass, the courts are in disagreement as to what conclusion of intent they will draw. In England it is the consistent policy to presume that there was no intent to create any ownership in the undivided mass. An early case, much referred to in American decisions,¹¹¹ did hold that a sale of 10 tons of oil, to be taken from a tank containing 40 tons, gave the buyer a right of action in trover against the seller, despite the fact that the part sold had never been in any way distinguished from the whole. This case, however, has not been followed in England.¹¹²

110—19 N. Y. 330.

111—*Whitehouse v. Frost*, 12 East 614.

112—*Gillett v. Hill*, 2 C. & M.

530 *dictum*; *Aldridge v. Johnson*, 7 El. & Bl. 885 (sale of grain); *Knights v. Whiffen*, L. R. 5 Q. B. 660 (sale of grain); *Wallace v.*

—**Estoppel.**—But, nevertheless, when the action is by the buyer of an unseparated part of a mass against the possessor of the whole, even the English courts show a readiness to allow recovery on the ground that the possessor has done something, however slight it may be, to estop himself from denying that the goods sold have actually been separated.¹¹³

—**Fungible Goods.**—In America a distinction is made between sales of part of “fungible” goods and those which are not fungible. By “fungible” or “homogeneous” is meant goods which are generally considered in terms of measurement rather than of individual units. Grain, for instance, is thought of in bushels rather than in numbers of kernels, and is considered as fungible. Hams and automobiles, however, are sold by numbers of individual units, not by measures-full, and bricks by numbers of bricks, not by tons. Such masses are not fungible. In case of sale of part of a mass of fungible goods there is, in America, a tendency to presume that an undivided ownership was intended to pass.¹¹⁴

Breeds, 15 East 522, 12 Rev. R. 423, 50 tons oil out of 90 tons in various casks—distinguished from *Whitehouse v. Frost* on ground that it was custom for seller to measure water and “foot-dirt” and fill up casks; *White v. Wilks*, 5 Taunt 176, 14 Rev. R. 735, 20 tons oil out of “vendor’s stock” which was in various casks, notes that oil was not in single container; *Bush v. Davis*, 2 M. & S. 397, 15 Rev. R. 288, 10 out of 18 tons of flax in mats; *Shepley v. Davis*, 5 Taunt 617, 15 Rev. R. 598, 10 out of 30 tons of hemp.

113—*Gillett v. Hill*, 2 C. & M. 530; *Aldridge v. Johnson*, 7 El. & Bl. 885; *Knights v. Whiffen*, L. R. 5 Q. B. 660.

114—*Cushing v. Breed*, 14 Allen (Mass.) 376, 92 Am. Dec. 777; *Chapman v. Shepard*, 39 Conn. 413, sacks of meal; *Welch v. Spies*, 103 Iowa 389; *Cloke v. Shafroth*, 137 Ill. 393; *McReynolds v. People*, 230 Ill. 623 *dictum*; *Mehts. Bk. v. Hibbard*, 48 Mich. 118; *Waldron v. Chase*, 37 Me. 414; *Kaufman v. Schilling*, 58 Mo. 218; *Halsey v. Simmonds*, 85 Ore. 324, 166 Pac. 944; *Seldomridge v. Bank*, 87 Neb. 531, 127 N. W. 871, 30 L. R. A. (n. s.) 337; *Brownfield v. Johnson*, 128 Pa. 254, 6 L. R. A. 48; *Russell v. Carrington*, 42 N. Y. 118; *Cassinelli v. Humphrey Supply Co.*, 43 Nev. 208, 183 Pac. 523, extended to sale of part of a larger mass of hay; *The Iron Cliff Co. v. Buhl*, 42 Mich. 86, iron ore.

Some cases, however, are in flat conflict with this presumption of intent and hold that title does not pass unless the intent is clearly evinced.¹¹⁵ A distinction must be noted between these conflicting cases and those in which some other rule of presumption than that referring to separation prevents a holding that title passed, as for instance the rule that where the seller is to put the goods in a deliverable condition title is presumed not to have passed until that is done.¹¹⁶ There is also a possibility of confusion in the fact already referred to, that some cases appear to hold that title to part of a mass will not pass when, in fact, in the particular case, there is not even a mass identified from which the property described is to be taken.¹¹⁷

—Non-Fungible Goods.—When the mass is not “fungible”, even though all the individual components of it may be of probably equal value, the judicial custom is to hold that a mere sale of a part thereof presumptively indicates no intent to pass title in the mass itself.¹¹⁸

But it is not impossible that parties should create coincident rights of ownership in the same mass, even though it be not fungible, and when the circumstances are such as clearly to demonstrate that they did so intend, even

115—Wood & Co. v. Roach, 52 Ill. Ap. 388, the same result might have been reached upon the Illinois doctrine that change of possession is necessary to perfect title as against subsequent purchasers; Mercer Natl. Bk. v. Hawkins & Co., 104 Ky. 171; Lawry v. Ellis, 85 Me. 500, hay from a mow; Jeraulds v. Brown, 64 N. H. 606; Keeler v. Goodwin, 111 Mass. 490, decision also put on the ground that plaintiff's action for conversion was precluded by fact that

defendant had a seller's lien on the property.

116—Backhaus v. Buells, 43 Ore. 558; La Vie v. Crosby, 43 Ore. 612; Bailey v. Long, 24 Kan. 90.

117—Kellog v. Frolch, 139 Mich. 612.

118—Gardner v. Suydam, 7 N. Y. 357, bbls. of flour; Commercial Natl. Bk. v. Gillette, 90 Ind. 268; Fordice v. Gibson, 129 Ind. 7; Grocer Co. v. Clements, 69 Mo. Ap. 446; Ferguson v. Northern Bk. of Ky., 14 Bush. (Ky.) 555, 29 Am. Dec. 418, hams.

without express statement, the courts will hold that such an ownership in common is created.¹¹⁹

Specified Part of Larger Mass.—Attention may be called to the distinction between the need of separation from a larger mass for purpose of *identification* and separation of *already identified* goods merely for the sake of physical possession. In the latter case there is of course no reason, from the point of view of identification, why title should not pass. Thus in the case of a sale of a stated number of tons of hay to be taken in a layer from the top of a hay-mow, there is nothing indefinite about the identification of the property sold. It is clearly identified as the top layer of the mow to a depth of the number of feet or inches required to weigh the stated amount. Other things, such as an undertaking of the seller to bale it, may raise a presumption that title was not intended to pass, but the identification is sufficient to constitute it a sale of specific property. So also, if one having on hand a quantity of barrels of mackerel sells "all he has" of grades "numbers 1, 2 and 3", the description is sufficiently definite to allow the usual presumption of intent as to the passing of title of specific property to apply.¹²⁰

Goods Not in Existence.—Parties sometimes contract for the sale of goods which may be specified, or merely described, but which the seller does not then own, or which are not even in existence. In such case it is quite obvious that no title can pass at the time the contract is

119—Hall v. Boston, etc., R. R. Co., 14 Allen (Mass.) 439, 92 Am. Dec. 783, 50 bbls. of flour out of a larger number; Kingman v. Holmquist, 36 Kan. 735; Mertz v. Putnam, 117 Ind. 392; MacKellar v. Pillsbury, 48 Minn. 396; State v. Wharton, 117 Wis. 558, lumber;

Cassinelli v. Humphrey Supply Co., 43 Nev. 208, 183 Pac. 523, hay.

120—Ropes v. Lane, 9 Allen (Mass.) 502; Lamprey v. Sargent, 58 N. H. 241, sale of all the "hard" bricks from a certain mass of hard and soft ones; Dunkart v. Rineheart, 89 N. C. 354, all of seller's trees of a stated girth.

entered into. If the seller does not own the goods, or if there are no goods in existence to be owned, he has nothing in the way of a title—there are no rights of ownership belonging to him—to be transferred. The transfer, if it is to be recognized at all by the courts, can only occur at a time after the seller has acquired an ownership by bringing the goods into existence, or otherwise.¹²¹

The same logic applies in the case where something that had been in existence has gone out of objective existence at the time the agreement is made. There being nothing in existence for ownership to apply to, there is no ownership. If, for instance, one person sells to another something which has passed out of existence, the buyer is allowed to recover his money on the ground that he received nothing from the seller.^{122*}

—Contracts to Sell.—Such an agreement, however, is not wholly void. Persons can enter into an agreement to transfer ownership of anything which is capable of being described. If such an agreement conforms to the legal requisites of contracts generally, it will not be void merely because the person agreeing to sell does not in fact own the thing described, or because the thing is not even in existence. Such a contract is valid and the par-

121—Low v. Pew, 108 Mass. 347; Gibson v. Pelkie, 37 Mich. 380; Emerson v. European etc. R. R. Co., 67 Me. 387, 24 Am. Rep. 39; Taylor v. Barton-Child Co., 228 Mass. 126, 117 N. E. 43.

122—Martin v. McCormick, 8 N. Y. 331; Allen v. Hammond, 11 Peters (U. S.) 63; Gibson v. Pelkie, 37 Mich. 380.

There is an apparent exception to the rule, that one who has no title himself can not give one, in the case of sales by order of court or in pursuance of legal enact-

ment. Sheriffs or other designated court officers, in making sale of property of judgment creditors, if they act in accord with law, can transfer ownership from the judgment debtor to the purchaser, although they themselves have no title. As a matter of fact, however, such officers act as agents of the real owner and, hence, are not really within the rule.

Persons acting in the capacity of agent for an owner can, of course, make legally effective transfers of his ownership.

*See Uniform Sales Act, Section 7, (1), (2).

ties are liable for its breach as in any other contract. Contracts of sale of wheat, as made on the various exchanges, often before the wheat described is grown, and sales of cotton not yet ready for the picking, are very frequent instances of contracts to pass title to something not even in existence at the time. These contracts are universally upheld as valid.¹²³ Even if the agreement is in form a present transfer, rather than a contract to transfer title in the future, the courts will nevertheless give it effect as a contract to transfer when possible.^{124*}

—**Acquisition of Goods.**—The question then arises, what is necessary to accomplish the transfer of title when the seller does become owner and, hence, able to pass it?

If it is clear that the parties had in mind that it should pass the moment the seller himself acquired it, there seems to be no reason why that intent should not be given legal effect. There is very little authority on this particular point. There is plenty of authority that it does not in fact pass coincidently with the seller's becoming able to pass it. But this practically all turns on the assumption that the parties *did not intend* it to pass then. It does not settle the question whether it could pass then if they clearly so intended. The case of *Low v. Pew*¹²⁵ is treated by commentators as authority for the proposition that title can not pass by virtue of the seller's mere acquisition of it, even if the parties so desire. In that case the facts were that the parties had entered into a contract reading, "We, John Low & Son, hereby sell, assign and set over unto Alfred Low & Co. all the halibut that may

123—*Hamil v. Flowers*, 184 Ala. 301, 63 So. 994; *Robinson v. Hirschfelder*, 59 Ala. 503; *Baker v. Lehman, Weil & Co.*; 186 Ala. 493, 65 So. 321; *Wright v. Vaughn*, 137 Ga. 52, 72 S. E. 412; *Watson v. Hazel-*

hurst, 127 Ga. 298; *Forsythe Mfg. Co. v. Castlen*, 112 Ga. 199.

124—*Bates v. Smith*, 83 Mich. 347; *Low v. Pew*, 108 Mass. 347.

125—108 Mass. 347.

*See Uniform Sales Act, Section 5, (1), (2), (3), 76, "Future goods".

be caught by the master and crew of the schooner *Florence Reed*, on the voyage upon which she is about to proceed * * * at the rate of five cents and a quarter per pound for flitched halibut, to be delivered to said Alfred Low & Co. as soon as said schooner arrived * * *.” The buyer paid \$1,500 on account. Before the vessel got back from her voyage the sellers had become bankrupt and their assignee took possession of the schooner’s cargo when she did arrive. A large part of her cargo, however, must have been caught before the bankruptcy. The buyers brought an action of replevin on the ground that title was in them. The court said that title could not have passed when the contract was entered into because there was then no title existing, and that if the contract were to be valid at all it must be considered as an agreement to pass title at a later date. The court then held simply that title had not passed to the buyers. As it seems a fair presumption from the form of the contract that the parties intended to pass title as soon as it should be possible, the interpretation of the decision is that such intention will not be given effect by the courts. It is often said that there must be a fresh demonstration of intent to pass title after the seller has become able, by acquisition, or manufacturer, to pass it.¹²⁶

126—In *Mucklow v. Mangles*, 1 Taunt. 518, however, is given a very practical reason which indicates that the rule is based on the seller’s probable lack of intent to pass title by merely manufacturing goods according to the contract. In this case the seller had practically completed a boat which accorded with the specifications of his contract of sale, had received money from the buyer on account of the work and had even gone so far as to paint the buyer’s name upon the boat. Nevertheless the title, so the court

held, had not passed. “A tradesman”, said the court, “often finishes goods, which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods so sold. The painting of the name on the stern in this case makes no difference.” Inasmuch as, in this particular case, the seller, who had become a bankrupt, could not have built an-

But, at any rate, whether it be because title *can* not be passed by the seller's mere acquisition of it, even though the parties so intend, or because it will not be assumed that the parties did so intend, the overwhelming weight of authority is that title does not pass merely as a result of the seller's acquisition of the property. The reason is not at all clear, but the rule is settled.¹²⁷

other boat for the buyer, the reasoning seems to be a statement of general principle.

The whole matter of reason is complicated by the fact that *as between the parties themselves*, the legal result of the agreement is sometimes the same as though title had passed upon mere manufacture or acquisition. The rights which the buyer acquires, as between him and the seller, are the same as those of legal ownership, but the courts say the buyer has those rights not because he is really owner in the eyes of the law, but because the seller, who is still the legal owner, will not be permitted to deny or object to the buyer's pretense of ownership. Thus in *Littlefield v. Perry*, 21 Wall. (U. S.) 205, 226, it appeared that Littlefield had transferred to Perry the ownership of the patent monopoly of a certain invention together with all the "improvements" which he should make in respect to the invention. The title to a monopoly of these improvements could not pass at time of the agreement because they were not in existence. Later Littlefield did make "improvements" and began using them himself. Perry sued him, for infringement, on the allegation that he, Perry, owned the monopoly of them. Littlefield defended on the ground that Perry was not owner and therefore

could not sue as such. The court admitted that the legal title was still in Littlefield but allowed the suit to continue nevertheless, saying, "Littlefield took the legal title in trust for them (Perry) and should convey. Courts of equity in proper cases consider that as done which should be. If there exists an obligation to convey at once, such courts will sometimes proceed as if it had actually been made." This case, like *Low v. Pew*, indicates that although the parties really intended that title should pass on its acquisition by the seller, yet it *could* not *legally* do so. *Curran v. Burdsall*, 20 Fed. 835; *Rowley v. Bigelow*, 12 Pick. (Mass.) 307; *Clark v. Slaughter*, 34 Miss. 65; *Hickman v. Dill*, 39 Mo. Ap. 246; *Sherman v. Champlain Transportation Co.*, 31 Vt. 162; *Harvey v. Harvey*, 13 R. I. 598; *Thrall v. Hill*, 110 Mass. 328.

Even this right of the buyer, through estoppel of the seller to deny it, does not exist if the seller has not even by implication warranted his title.

127—In *Wheeler's Exrs. v. Wheeler*, 59 Ky. 474, 74 Am. Dec. 421, the plaintiff, who was a son of the deceased testator, sought to compel his father's executors to distribute to him the property to which he was entitled by the will. The Executors answered that it was claimed by one X who had

—**Manufacture.**—Neither, for one reason or another, will title be held to have passed because of mere manufacture of goods according to the contract by the seller.¹²⁸

bought it from young Wheeler before the father's death, though after the will had been made. The plaintiff did not deny that he had made an agreement whereby he had "sold all my individual interest of all the personal property now in the possession of my said father." The court, however, held that nothing could be sold which the seller did not own and the buyer in this case had acquired no title to anything by his purchase.

Again, in *Welter v. Hill*, 65 Minn. 273, it appeared that X had made what purported to be a present sale to plaintiff of flax which X expected to grow upon a particular field, but for which the seed had not even been sown at the time. When the crop had been raised as agreed, it was seized by a creditor of the seller, X. The plaintiff, as buyer, claimed title in himself but the court rejected the contention, saying, "When did the title to the property pass? It did not pass when the bill of sale was made, because it was not then in existence." As nothing subsequent had been done to pass it, it had not passed when the creditor's levy was made.

McCall v. Hampton, 98 Ky. 166, 56 Am. St. 335; *Elliott v. Leslie*, 124 Ky. 553, 124 Am. St. 418; *Skipper v. Stokes*, 42 Ala. 255, 94 Am. Dec. 646; *Herbert v. Bronson*, 125 Mass. 475 (future wages); *Farmer's National Bk. v. Coyner*, 44 Ind. Ap. 335 *dictum*; *Gile v. La Salle*, 89 Ore. 107, 171 Pac. 741.

In *Wheeler v. Becker*, 68 Ia.

723, 28 N. W. 40, however, a mortgagee of property not in existence at the time was allowed to bring an action of replevin against attaching creditors, on the ground that the mortgage took effect when the property came into the seller's ownership. *Accord*, *Morris v. Hix*, 74 Ia. 526, 38 N. W. 395; approved, though not in point, *McMaster v. Emerson*, 109 Ia. 284, 80 N. W. 389; In *Maskelinski v. Waznenski*, 20 N. Y. Supp. 533, the buyer of property not owned by the seller was allowed to set up title to the property as against the seller, when the latter did acquire it, without any other pretense of title's having been transferred. This was put upon the ground that title had passed, or at any rate the seller had waived his right to deny it.

128—*Fordice v. Gibson*, 129 Ind. 7, "No title passes until the thing is completely done and notice given to the vendee, or some act done by the vendor designating it as the article sold, either by setting it apart, marking it or some other similar act." *Robbins v. Chipman*, 1 Utah 335 *dictum*; *Heiser v. Mears*, 120 N. C. 443 *dictum*; *Urdike v. Henry*, 14 Ill. 378; *West Jersey R. R. Co. v. Trenton Car Works*, 32 N. J. L. 517, even though payment be made in advance; *Edwards v. Elliott*, 36 N. J. L. 449, payment for vessel in installments; *First Natl. Bk. of Marquette v. Crowley*, 24 Mich. 492; *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320, 60 Am. Rep. 162; *Rev. Cutter #2*, Fed.

When the goods contracted to be sold are the *entire output* of a factory it does seem that their manufacture indicates an intent to pass the title to them under the contract more certainly than in cases where the manufacturer could dispose of the particular thing manufactured and then make another one to satisfy his contract with the buyer. In *Williams v. Chapman*,¹²⁹ the seller had contracted to sell the entire output of his mill for a certain time and the court held, without any discussion of the matter, that title passed to the goods produced during that time as soon as they were completed. On the other hand, in *Gabarron v. Kreeft*,¹³⁰ the seller had contracted to sell all the ore produced by a certain mine. Payment had been made in advance for the particular cargo of ore in question. The court held, again without discussion, that the title did not pass when the ore was produced. This very conflict, however, indicates that in such cases at least the title *can* pass on acquisition, or manufacture, if the parties do in fact so intend.

—**Payment During Course of Manufacture.**—Another field of conflict is the question whether, when goods to be manufactured are to be paid for in instalments, such payment effectuates a passing of title to so much of the goods, or of the particular chattel, as has been manufactured at the time. A much cited authority on this point is *Woods v. Russell*.¹³¹ In this case it appeared that one Paton had contracted to build a ship for defendant, who was to pay in instalments at certain points of progress. After three payments had been made and before the ship was finished a question of title arose. There was very clear evidence, other than the mere payments, that the builder had intended to pass title to so much as was done at the time and the court accordingly

Cas. #111714; *Gabarron v. Kreeft*,
L. R. 10 Exch. 274, all ore to be
produced during certain time;
Haynes v. Quay, 134 Mich. 229.

129—118 N. C. 943.

130—L. R. 10 Exch. 274.

131—5 Barn. & Ald. 942.

held that title had passed. But the court said also, in regard to the payments, "The payment of these instalments appears to us to appropriate specifically to the defendant the very ship in progress, and to vest in the defendant a property in that ship, and that, as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other."

The holding that title to so much as is done passes as it comes into existence, and, consequently, that title to the goods is in the buyer at the time of completion is nevertheless only a legal presumption from the circumstances. The fact that title is thus held to have passed when work is paid for in instalments and not to have passed in cases where there is no partial payment, is not due to any peculiar legal effect of part payment, but to the belief of some courts, particularly those of England, that payment and its acceptance indicates a real intent that so much of the work as has been done shall belong to the buyer.

This is clearly indicated in *Wood v. Bell*.¹³² One Joyce had agreed to build for plaintiff a ship of a certain description, for which plaintiff was to make payment in instalments at various times, regardless of the actual stage of completion of the work. Before the ship was completed, or in any way expressly indicated as belonging to plaintiff, Joyce became bankrupt and the question of title arose. The court said, "The property does not pass merely by its being manufactured, but only when it is the intention of the parties that it shall pass." It held that title was in the plaintiff, not because the work was to be paid for in instalments, nor because the ship was of a peculiar construction particularly required by plaintiff, nor because plaintiff's name had been punched in the keel, but because all the circumstances of the

132—5 EL. & BL. 772, 119 Eng.
Rep. 669, Affd. 6 EL. & BL. 355, 119
Eng. Rep. 897.

transaction, as a whole, indicated that such had been the intent of the parties.¹³³

In America the fact that work is to be paid for in installments as it progresses, or that it is under the supervision of the seller, or other like circumstances, is not, as a general rule, held to indicate any intent to pass title as the work is completed. In *Clarkson v. Stevens*,¹³⁴ the Supreme Court decided that title to a certain vessel to be manufactured for the United States government had not passed to the government on completion. In reaching this conclusion the court said, "The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent, open in every case, to be determined upon the terms of the contract, and the circumstances attending the transaction. And such seems to us to be the true principle. According, we are of opinion, that the fact that advances were made out of the purchase money, according to the contract, for the cost of the work as it progressed, and that the government was authorized to require the presence of an agent to join in certifying to the accounts, are not conclusive evidence of an intent that the property in the ship should vest in the United States prior to final delivery."¹³⁵

133—*Moody v. Brown*, 34 Me. 107; *Butterworth v. McKinley*, 11 Humph. (Tenn.) 206; *Sandford v. Wiggins Ferry Co.*, 27 Ind. 522; *Scudden v. Calais Steamboat Co.*, 1 Cliff. 370; *Clark v. Spence*, 4 Ad. & E. 448; *Carruthers v. Paine*, 5 Bing. 270; *Laidler v. Burlinson*, 2 M. & W. 602.

134—106 U. S. 505.

135—*Williams v. Jackman*, 16 Gray (Mass.) 514, even though an agent of the buyer had been permitted to supervise the construction; *Edwards v. Elliott*, 36 N. J.

L. 449; *Re Revenue Cutter #2*, Fed. Cas. #11714; *The Poconoket*, 67 Fed. 265; *The Yukon River Co. v. Grotto*, 136 Cal. 538; *Andrews v. Durant*, 11 N. Y. 35.

In the case of *The John B. Ketcham*, 97 Fed. 872, the court, while admitting that intention would govern, held that the parties had no intention to pass title at the payment of installments even though engines belonging to the buyer had been worked into the ship. For the manufacturer to incorporate property of the buyer in something which fits the de-

—**Rule in Equity.**—The rule that ownership will not be treated as having passed unless there is something more to show intent than mere manufacture or acquisition, is not altogether adhered to by courts of equity. It is frequently held that whatever powers or privileges the parties intended should eventually pass to the buyer will be given effect by courts of equity, even as against third persons who have secured intervening rights, as soon as they are capable of passing. In *Kribbs v. Alford*¹³⁶ plaintiff was the mortgagee of certain property already owned by the mortgagor and of other described property to be acquired. This latter property was subsequently acquired by the mortgagor, but before any further demonstration of intent to pass an interest in it to the mortgagee was made, the mortgagor sold it to the defendants, who took possession. These purchasers did not actually know of the mortgage, but were held to have had constructive notice of it because it had been recorded. The court held the plaintiff's interest to be paramount to that of the defendants. It admitted that the plaintiff's claim would be invalid at law, but said, "Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law. But it construes the instrument as operating by

scription in the contract of sale seems clearly to indicate that he intends, at least, that the contract shall apply to that particular property. The holding of the court, that despite this fact he did not intend title to pass, is quite out of harmony with the general principle already pointed out that when the property subject to the

contract has been pointed out, price ascertained, etc., title will be presumed to have passed regardless of delivery. In *Re McDonald*, 138 Fed. 666, title to uncompleted ships was held to have passed because the parties had expressed an intent that it should.

136—120 N. Y. 519.

way of present contract to give a lien, which as between the parties takes effect and attaches to the subject of it as soon as it comes into the ownership of the party. Such we deem the rule to be in equity in this state." The principle behind such holdings is expressed as being that, "Equity treats a mortgage of property to be afterward acquired as a contract, binding in conscience, to execute a mortgage upon it at the very instant it comes into being, and will enforce specific performance. It does more: It considers it as already done if no specific performance be requested; and then, by virtue of the equitable doctrine of notice, binds everybody to respect the equitable lien who knows of it, or, without knowing of it, has got the property without valuable consideration."¹³⁷

Many courts have held, however, that even in equity a buyer gets no rights in the property itself by a mere sale of property to be acquired in the future.¹³⁸

But even of these cases a number hold that if possession is actually taken it will be treated as a transfer as of the date of the mortgage, so far as concerns preferences under bankruptcy and insolvency acts.¹³⁹

Potential Interests.—Sales of "potential interests" do not fall within the foregoing discussion. They are

137—From Little Rock, etc. R. R. Co. v. Page, 35 Ark. 304. Acqd. Phillips v. Winslow, 18 B. Monroe (Ky.) 431, 68 Am. Dec. 729; Pierce v. Milwaukee, etc. R. R., 24 Wis. 551, 1 Am. Rep. 203; Morrill v. Noyes, 56 Me. 458, 96 Am. Dec. 486; Apperson v. Moore, 30 Ark. 56, 21 Am. Rep. 170; Hurst & McWhorter v. Bell & Co., 72 Ala. 336; Grant v. Steiner, 65 Ala. 499; Holroyd v. Marshall, 10 H. of L. Cas. 191, the leading English case. But, *contra*, Burns v. Campbell, 71 Ala. 271, 288; Elec.

Lighting Co. v. Rust, 117 Ala. 680; Pennock v. Coe, 23 How. 117; Butt v. Ellett, 19 Wall. 544.

The subject is discussed at length in 19 Harvard L. R. 557.

138—Gittings v. Nelson, 86 Ill. 591; Redd v. Burrus, 58 Ga. 574; Mehts. Bk. v. Lovejoy, 84 Wis. 601; Chase v. Denny, 130 Mass. 566; Orcutt v. Moore, 134 Mass. 48; Cooke v. Blanchard, 144 Mass. 207.

139—Chase v. Denny, 130 Mass. 566; Mower v. McCarty, 79 Vt. 142, 7 L. R. A. (n. s.) 418, annotated.

treated by both equity and law courts either as though the "potential interest" were a thing capable of sale and in actual existence at the date of the contract, or as though acquisition of ownership alone passed the title. There is no inherent or practical reason for this distinction. The "potentiality" may have a separate existence metaphysically, but it can not be so distinguished really. The practical reasons that might apply in the preceding cases would apply also to cases of sales of a potentiality. Nevertheless, the legal distinction does exist.

In those cases where the thing sold is the future *natural* increase or natural production of something already owned by the seller it is generally held that a present demonstration of intent to transfer ownership will be recognized by the courts as having transferred it when the thing does come into existence, without any further demonstration of intent. As was just pointed out, a buyer of something not in existence at the time of sale, to whom there has been no subsequent transfer, has no legal rights against a third person who acquired an ownership after the thing came into existence. But where the thing sold is to come into existence as the *natural* increase or product of something already owned by the seller, such a buyer's rights are treated as superior to those of another who purchased after the thing came into existence.

For instance, in one case¹⁴⁰ it appeared that Rogers had allowed his stallion to cover Buler's mare, on Buler's agreement that the resulting colt should be the property of Blevins. Nothing was done thereafter to effectuate or demonstrate a transfer. When the colt was born, Buler, in breach of his agreement, sold it to McCarty. Blevins, however, was allowed to recover it in replevin on the ground that he had title. This holding differs

140—McCarty v. Blevins, 5
Yerger (Tenn.) 195, 26 Am. Dec.
262.

from the customary ones, which support the third parties' rights as against one who had bought before the chattel was in existence, because of the fact that the colt was "potentially" in existence at the time of the agreement.¹⁴¹

It does not appear with certainty from the cases, and does not particularly matter, whether the title to the *potentiality* is considered as passing, so that the colt, or the crop, or whatever the thing may be, belongs to the buyer as the product of the potentiality of which he had already become owner, or whether the courts simply make such sales an exception to the general rule and hold that title to the colt, etc., transfers to the buyer when it comes into existence because of the previous agreement that it should do so and without any concurrent act. The result is the same on either theory.

Some cases support the former theory and indicate that the "potentiality" is something capable of an ownership separate and apart from the ownership of the thing of which it is physically an indivisible part. Thus, one person may be owner of a mare and another owner of her reproductive power, although the two things can not be physically separated. In *Fonville v. Casey*¹⁴² defendant had contracted that the first female colt to be born from his mare should belong to plaintiff. When a female colt was born defendant refused to let plaintiff have her. The court permitted plaintiff to recover in trover as *owner* of the colt. The reason given was that "although it be uncertain whether the thing granted will ever exist, and it consequently can not be actually in the grantor, or certain, yet it is in him potentially, as

141—*Sawyer v. Gerrish*, 70 Me. 254, 25 Am. Rep. 323; *Watkins v. Wyati*, 9 Baxt. (Tenn.) 250, 40 Am. Rep. 90; *Booker v. Jones Admx.*, 55 Ala. 266; *Fonville v. Casey*, 1 Murphey (N. C.) 389, 4 Am. Dec. 559; *Hull v. Hull*, 48 Conn. 250;

Mitchell v. Abernathy, 194 Ala. 698, L. R. A. 1917 C 6; *Nestell v. Hewitt*, 19 Abb. N. C. (N. Y.) 282, crop from roots already in ground.

142—1 Murphey (N. C.) 389, 4 Am. Dec. 559.

being a thing *accessory to something which he actually has in him*, for such potential property may be the subject, of a *contract executed, as a grant or the like.*" This indicates that a present title to the potentiality passed.¹⁴³

—**What is a Potential Interest.**—This rule, that title to the tangible thing sold is in the buyer as soon as it comes into existence, applies only when the thing was "potentially" in existence at the time of the contract. Generally speaking, it may be said that nothing has potential existence which is not the *natural* increase or product of something in tangible existence. The young of animals, crops produced by the earth, and wool grown upon animals are all natural products and have all been held to have a potential existence. Only such things are natural products, and, with some notable exceptions, nothing else has been held to have a potential existence. A probability, or expectation, that because of one's possession of certain things one can acquire or create other things by his own exertions, and not as the result of the action of nature, is not a potential interest. In *Low v. Pew*,¹⁴⁴ there was a probability that the crew of a fishing schooner would catch fish, but the fish would not be the *natural* production of the vessel, and it was held that they had no potential existence. So, too, in *Orcutt v. Moore*,¹⁴⁵ the owner of land had leased it to a tenant for half the crop which the tenant should raise. The owner then sold his half of the prospective crop to the plaintiff, but before plaintiff could take possession of it, after its eventual maturity, defendant seized it for an execution creditor. The court

143—*Losecco v. Gregory*, 108 La. 648, "Hope of a future crop, as an incorporeal thing, separate from the crop itself" is made merchantable by Civ. Code, sec. 2450, 2451.

The early case of *Grantham v.*

Hawley, Hobart 132, to which most cases on potential interest go back for authority does not indicate either theory.

144—108 Mass. 347.

145—134 Mass. 48.

said the rights of the parties depended upon a finding by the jury as to whether the owner of the land had retained a potential interest in half of the crop or had sold his entire potential interest to the tenant and was merely to be repaid with half of the crop. If he had retained an ownership in the future crop, and had conveyed to the tenant ownership in only half of what should be raised, his sale of his potential interest to plaintiff gave plaintiff title to the half of what had been raised. But if the lessor had intended to transfer ownership of all the crop to the lessee and take back half of it as pay, he had not a potential interest but only an *expectancy of payment*. This expectancy he could not transfer like a potential interest and defendant's rights would be superior to plaintiff's. This illustrates well the difference in rules between sale of what one does not own, but expects to acquire, and the sale of a potentiality out of which some tangible thing is expected to spring. In the former case title does not pass without some demonstration of intent to pass it after the seller has acquired it; in the latter the title to the tangible thing vests in the purchaser immediately on its coming into existence as a result of the sale of the potentiality.¹⁴⁶

146—Some cases take a contrary view and hold that there may be a potential interest which will pass title *in futuro* in things which are the expected but not the natural product of property already owned. In *Wiant v. Hayes*, 38 W. Va. 681, one H. owned certain land which was about to be sold for taxes. By the law any excess from the sale over the amount of taxes would belong to H. Before the tax sale H. sold to K. his right to any possible excess. The excess not being in existence K. could have no title at that time. Subsequent to this, plaintiff acquired a judg-

ment lien against all of H's property. The issue was as to respective rights of K. and plaintiff in this excess. The court called H's right to the excess a "potential interest" in it and declared K's title therefore superior to that of plaintiff.

In *Dargin v. Hewlett*, 115 Ala. 510, the owner of a race track was said, as a matter of *dictum*, to have a "potential interest" in the profits of its operation which could be the subject of sale so as to pass title without further act. As the action was between the parties for an accounting in equity, the statement was unre-

There is some question whether the doctrine of potential interest is broad enough to pass title, without further act, to crops which are not even planted at the time of sale. Some courts have held that even in such case title passes as soon as the crop comes into existence.¹⁴⁷ The general rule, however, appears to be that there is no potential interest in crops for which the seed has not been sown.¹⁴⁸ It has even been said that title would not pass until the crop was threshed and ready for delivery.¹⁴⁹

There is a similar conflict as to whether there is a potential interest in the young of animals before the dam has actually been covered by the sire. Some cases recognize that there is such an interest prior to impregnation.¹⁵⁰ Other cases hold that no title passes by the agreement, without some subsequent act, unless the offspring was *in foetu* at the time.¹⁵¹

lated to any issue. *Kerr v. Crane*, 212 Mass. 224, 40 L. R. A. (n. s.) 692. As to whether the assignment of a debt due or to become due creates in the assignee a title or mere personal right, see the controversial articles by Messrs. Cook and Williston in the *Harvard Law Review*.

Many cases hold that an assignment of rights of action, to become effective *in futuro*, is valid, but this does not involve question of title and should not be confused.

147—*Dickey v. Waldo*, 97 Mich. 255, holds that the buyer could bring an action for conversion against the seller; *Argues v. Wasson*, 57 Cal. 620, 21 Am. Rep. 718; *Jones v. Webster*, 48 Ala.

109; *Miller v. Chapel*, 35 Minn. 399, 29 N. W. 52; but, compare *Welton v. Hill*, 65 Minn. 273; *Patch v. Tutin*, 15 M. & W. 110.

148—*Farmers Natl. Bk. v. Coyner*, 44 Ind. Ap. 335; *Hutchinson v. Ford*, 9 Bush (Ky.) 318, 15 Am. Rep. 711; *Apperson v. Moore*, 30 Ark. 56, 21 Am. Rep. 170; *Hurst v. Bell*, 72 Ala. 336, *dictum*; *Grant v. Steiner*, 65 Ala. 499; *Welton v. Hill*, 65 Minn. 273.

149—*Welton v. Hill*, 65 Minn. 273.

150—*McCarty v. Blevins*, 5 Yerger (Tenn.) 195, 26 Am. Dec. 262; *Hull v. Hull*, 48 Conn. 250; *Fonville v. Casey*, 1 Murphey (N. C.) 389, 4 Am. Dec. 559.

151—*Bates v. Smith*, 83 Mich. 347.

CHAPTER III

SELLER'S REMEDIES AND RIGHTS

1. BOTH TITLE AND POSSESSION RETAINED

Thus far we have discussed the question whether, in the particular case, title has passed to the buyer or not. We now assume, without further discussion, that it has passed or has not passed as the fact may be in the particular case, and consider the seller's remedies upon that assumption.

Breach of Contract.—As was before pointed out, every transfer of title must be preceded or accompanied by an agreement to pass title, which agreement is in effect a contract, either express or tacit. Until there is at least a contract to buy and sell there is of course no "seller" to claim any remedy—there is at most only a would-be seller. But after a contract has been entered into, and before title has been passed, the seller has the same rights and remedies that any promisee under a contract has. The buyer has promised to take the title to certain described property and to pay a certain price in exchange therefor. Failure so to do has the same effect, and no more, as any breach of contract. It would be out of place to discuss the rights in respect to a contract and the remedies for its breach in this work. They involve too general a knowledge of contracts to be briefly discussed and reference must be made to works treating of contract law especially.

In general, it may be said without discussion, that under certain circumstances of failure by the buyer to perform his promise, the seller may treat the contract

as rescinded and as though it had never existed.* In any event, if there has been a breach by the buyer the seller may treat his own contract liability as being at an end and need do nothing more under the agreement. He may have received nothing from the buyer, but, conversely, he has parted with no title and may not even have parted with possession.

If the buyer breaks his contract, the seller, regardless of his other remedies, may always sue for damages. It is not the purpose of this book to discuss what constitutes a breach of contract by a party thereto. Neither can the things which the other party must do, or the position he must assume, before he can sue because of the breach, be here gone into. It may be said, however, that, broadly speaking, the seller must himself be willing and able to carry out his side of the bargain, and must have done everything necessary according to the contract to entitle him to performance by the buyer.†

—**Damages.**—If the buyer's breach occurs before the seller has parted with either title or possession, it is obvious that the seller's loss, his damage, is only the difference between what he could get immediately from some other buyer and what the defaulting buyer agreed to pay. Since he still has the chattel, he is not *damaged* to the full extent of the agreed price, but only to the extent of the difference in realizable value of the chattel and the agreed price. This is the clearly settled rule.¹

1—*Bigelow v. Legg*, 102 N. Y. 173; *Mayo v. Lathern*, 159 Mich. 652; *Unexcelled v. Polites*, 130 Pa. 136; *Moffat v. Davitt*, 200 Mass. 536; *Murray v. Doud*, 167 Ill. 368; 452; *Rickey v. Tenbroeck*, 63 Mo. 563; *Poel v. Brunswick-Balke Co.*, 159 N. Y. App. Div. 365; *Peters v. Cooper*, 95 Mich. 191; *Mohr Hardware Co. v. Dubey*, 136 Mich. 677, difference between contract and

*See Uniform Sales Act, Section 65.

†See Uniform Sales Act, Section 41, 42, 43, (1), (2), (3), (4), (5), 44, (1), (2), (3), (4), 45, (1), (2), 46, (1), (2), (3).

This value to the seller of the chattel which he still owns should logically be the largest amount which he could get from someone else—that is to say, its *market value*—as soon after the buyer's refusal as he could reasonably be expected to re-sell it. There is very much loose statement in the decisions, but this rule is the basis on which the courts strive to ascertain the damages fairly.²

Of course, if the seller would be put to extra expense in finding another purchaser and selling to him, the value of the chattel to the seller would not be the gross price of the resale, but that price less the cost of making the second sale. The courts therefore allow this expense to be deducted from the possible resale value in order to fix the actual value to the seller of the chattel left in his hands by the defaulting buyer.³

On the other hand, if the seller could get rid of the goods to another without certain expenses which he

cost to seller rejected as measure of damage; *Cole v. Zucarello*, 104 Tenn. 64; *Krebs Hop Co. v. Livesley*, 59 Ore. 574, not limited to difference between contract price and price, higher than market value, which defendant later offered; *Schramm v. Boston Sugar Co.*, 146 Mass. 211. This common law rule has been declared by statute in some states.

2—It has even been held that this difference between the contract price and the market value must be stated in the petition, *Ridgley v. Mooney*, 16 Ind. Ap. 362; *Dill v. Mumford*, 19 Ind. Ap. 609.

3—*Peters v. Cooper*, 95 Mich. 191; *Am. Hide Co. v. Chalkley*, 101 Va. 458; *Holliday v. Lesh*, 85 Mo. Ap. 285; *Tufts v. Grewer*, 83 Me. 407; *Piowaty v. Sheldon*, 167 Mich. 218; *Woods v. Cramer*, 34

S. C. 508; *Slaughter v. Marlow*, 3 Arizona 429; *Hill v. McKay*, 94 Cal. 5, cost of transportation to nearest market; *McCracken v. Webb*, 36 Ia. 551, cost of keeping till market could be found; *Red-head Bros. v. Investment Co.*, 126 Ia. 410, Id; *Lewis v. Greider*, 51 N. Y. 231, insurance; *Best Mercantile Co. v. Brewer*, 50 Colo. 455, seller's traveling expenses; but cf. *Penn. v. Smith*, 93 Ala. 476; *Texas Lumber Co. v. Rose* (Tex.) 103 S. W. 444, but not expenses of attempted collection; *Zimmerman v. Rock Island Canning Co.*, 145 Ky. 25, nor unnecessary expenses; *Chapman v. Ingram*, 30 Wis. 290, Id; *Gehl v. Milwaukee Produce Co.*, 105 Wis. 573, Id; *Thurman v. Wilson*, 7 Ill. Ap. 312, Id; *Armsby Co. v. Raymond Bros. Co.*, 90 Neb. 553, necessity depends on facts of each case.

would have been put to had the buyer not broken the contract, in such case the seller is not damaged by the breach to the full amount of the difference between the contract price and the resale value, but to that amount less the expense saved. This saving of expense should be deducted from the difference.⁴

—Ascertaining Damage.—It being established that the seller's damage is the difference between the agreed price and the amount he can get for the chattel otherwise, the question is how the latter amount shall be ascertained. This is a matter of evidence. Anything that reasonably and properly tends to show the market value may be given in evidence.

If no evidence at all is given, the presumption is that the market value and the contract value are the same and the damage awarded will, therefore, be merely nominal—six cents, or any other small sum awarded for the sake of carrying costs in the suit in the plaintiff's favor.⁵

On the other hand it might be that the chattel contracted for has no monetary value, no saleability to anyone else at all. In such a case the actual loss to the seller through the buyer's breach of contract, being the difference between what the buyer agreed to pay and the monetary value of the chattel to the seller, which is nothing, would be the full amount of the contract price.⁶

If it happens that the market value at the time of breach was in fact higher than the contract price, and the seller has elected to treat the contract as broken, and has resold at the higher price, the buyer is, of course, not entitled to the surplus. The goods were not his—he having refused to accept the title—so that he would have no right to any part of the resale price on that ground,

4—Newark City Ice Co. v. S. 867; International Textbook Fisher, 76 Fed. 427. Co. v. Schulte, 151 Mich. 149.

5—Tufts v. Bennett, 163 Mass. 398; Petigor v. Ward, 74 N. Y. 5—Manhattan City, etc. Ry. Co. v. Genl. Elec. Co., 226 Fed. 173; Wells v. Maley, 5 Ky. L. Rep. 77.

and, having broken the contract, he can not thereafter elect to enforce it.⁷

It is not obligatory for the seller to resell the chattel if he can furnish satisfactory proof of its actual monetary value at the time of breach in some other way.⁸ Indeed, in the case of a contract of sale of goods to be manufactured and a repudiation by the buyer before their completion the seller is not expected to continue the work.⁹ It is not even permissible for him to do so.¹⁰

If the seller does elect to retain the goods as his own and to prove their market value in some other way, the fact that he subsequently resells the goods will not in any way affect his recovery of the difference between the contract price and the market value at the time of breach. If, for instance, the market value at the time of his eventual resale should be higher than the contract price, he would still be entitled to the difference between the *market value at the time of breach* and the contract price.¹¹

—**Resale to Demonstrate Damage.**—If he does choose to make a resale, and if he makes it within a reasonable time after breach, at the nearest available market, by public auction, and after actual or constructive notice to the buyer, so that the latter may protect himself by being present, then the amount realized at such sale will be accepted by the courts as conclusive evidence of the market value.¹²

7—Warren v. Buckminster, 24 N. H. 336.

8—Barrett v. Verdey, 93 Ga. 526; Hewes v. Germain Fruit Co., 106 Cal. 441; Kellog v. Frolich, 139 Mich. 612.

9—Gardner v. Deeds, 116 Tenn. 128, 4 L. R. A. (n. s.) 740.

10—Heiser v. Mears, 120 N. C. 443.

11—Sour Lake Townsite Co. v. Deutser Furniture Co., (Tex.) 94

S. W. 188; Bridgeford v. Crocker, 60 N. Y. 627.

12—Davis Sulphur Ore Co. v. Atlantic Co., 109 Ga. 607; Hewes v. Germain Fruit Co., 106 Cal. 441; Carriage Co. v. Gilmore, 123 Mo. Ap. 19; Fox v. Woods, 96 N. Y. S. 117, even though the resale was private instead of at public auction; Van Brocklen v. Smealie, 140 N. Y. 70, private sale; Pollen v. LeRoy, 30 N. Y. 549,

But even if the seller does not give notice of resale, or otherwise observe all the strict requirements, the price actually secured by the resale is not absolutely rejected as evidence. Only its weight is affected. Inasmuch as the seller does not need to make a resale at all in order to fix his damages, if he can furnish other evidence, it naturally follows that he can resell or otherwise dispose of his property in any way he, as owner, sees fit. The only limitation upon this right of disposal is the obviously fitting one that the amount secured by the resale will not be accepted as conclusive evidence of the real market value unless the resale was made under such circumstances as to indicate that the amount received was in fact the market value. As one court put it, "The sale, in such circumstances, is but a method, as before indicated, of enforcing a right to damages for breach of contract, and of making evidence of the precise amount of such damages. * * * If he sues for his damages without selling the property or without selling the same with proper regard to the rights of the executory vendee, he takes upon himself the burden of establishing the fair market value of the goods at the time of the breach. So it is said that notice to the vendee of the vendor's intention to make the sale, and the sale, with proper regard to the interests of the former, merely create definite and conclusive evidence of such market value."¹³ The courts, therefore, do not refuse to receive the results of a resale as evidence of the market value merely because it was made without notice, or was a private sale instead of a public one, or was in any respect not conventional. They receive it in evidence, just as any other evidence is

without notice to buyer; *Wrigley v. Cornelius*, 162 Ill. 92, without notice; *Ackerman v. Rubens*, 167 N. Y. 405, although seller himself was purchaser at public sale; *Nelson v. Hirsch & Sons Co.*, 102 Mo. Ap. 498, resale made some time after breach, but within a

reasonable time; *Black River Lumber Co. v. Warner*, 93 Mo. 374, *accd.*; *Magnes v. Sioux City Co.*, 14 Colo. Ap. 219; *McDonald Cotton Co. Mayo*, — Miss. —, 38 So. 372.

13—*Pratt v. S. Freeman & Sons Co.*, 115 Wis. 648.

received, and subject to the general rules of materiality, relevancy, competency, etc.¹⁴ But it will not be received as conclusive evidence unless it appears to have been a fair demonstration, from the point of view of both parties, of the real market value.^{15*}

It must be borne in mind that the foregoing discussion is applied to resales to fix the market value in cases where title is still in the seller. When title has passed from the seller, and he resells, as agent of the buyer, to enforce his seller's lien, other principles apply.¹⁶

Recovery of Purchase Price.—A seller who still retains title and possession is limited to this action for damages for breach of contract. He can not sue to recover the amount of the purchase price, as such.¹⁷ Various writers

14—Gehl v. Milwaukee Produce Co., 105 Wis. 573; Carriage Co. v. Gilmore, 123 Mo. Ap. 19; Anderson v. Frank, 45 Mo. Ap. 482; Moore v. Potter, 155 N. Y. 481; A resale made after suit commenced will not be received in evidence, Hardwick v. Can Co., 113 Tenn. 657; Brownlee v. Bolton, 44 Mich. 218; Pollen v. LeRoy, 30 N. Y. 549; Am. Hide Co. v. Chalkley, 101 Va. 458, notice of intent to resale is mere evidence relating to market value.

Some distinction is made between notice of *intention to sell* and notice of time and place. Some cases hold specifically that even the former is not necessary, Leeper v. Schroeder, 24 Colo. Ap. 164; Wallace v. Coons, 48 Ind. Ap. 511; Clore v. Robinson, 18 Ky. L. R. 851; Kellogg v. Frolich, 139 Mich. 312; and it is generally held that the buyer's refusal puts him on notice that a resale may be made, Wrigley v. Cornelius, 162

Ill. 92; Ullman v. Kent, 60 Ill. 271; McDonald Cotton Co. v. Mayo, — Miss. —, 38 So. 372.

But other cases require notice of an intention to resell at least, Winslow v. Harriman Co., 42 S. W. 698, *semble*, as title had passed; Pillsbury Flour Co. v. Walsh, 60 Ind. Ap. 76, 110 N. E. 96; Davis Sulphur Ore Co. v. Atlanta Co., 109 Ga. 607.

15—Case v. Simonds, 7 N. Y. Supp. 253; Bigelow v. Legg, 102 N. Y. 652.

16—See p. 129.

17—Although, as noted above, the damages may happen to equal the purchase price.

The retention of *title* should not be confused with retention of *possession*. As we have already seen, title may be transferred, and usually is, before possession is passed and even though the buyer has no right to possession till payment. In such case the buyer's refusal to accept the possession of

*See Uniform Sales Act, Section 64, (1), (2), (3), (4).

have pointed out that while an action will lie to recover damages for breach of a contract, even though the consideration for the contract be only a reciprocal promise, an action in debt for a specific sum owing to the plaintiff from the defendant can not be maintained unless the defendant has received something more than a mere promise from the plaintiff.¹⁸ Until the seller has passed the title to the buyer, therefore, the latter has received only the seller's promise and the seller is not the owner of the sum agreed to be paid. The broad rule is indubitably that a seller who has not in fact passed the title to the buyer can not sue for any sum which the buyer agreed to pay for the title, but only for damages resulting from the buyer's refusal to perform his promise. One position of the courts appears to be that no debt on the buyer's part is implied by law in return for the seller's mere promise without other *quid pro quo*; that the seller does not become the owner of the purchase price and the buyer does not hold it as a debt due the seller until the seller has performed the consideration for which the buyer has promised to pay; that is, until the buyer has become the owner of the property contracted about. Another position is that the buyer has not even undertaken to pay the purchase price until he shall have acquired the title.

Mr. Justice Holmes has expressed the latter idea as a *dictum*, thus:¹⁹ "In an ordinary contract of sale the payment and the transfer of the goods are to be concurrent acts, and if the buyer refuses to accept the goods, even wrongfully, he can not be sued for the price, because the event on which he undertook to pay the price has not happened; and although the fact that it has not hap-

the goods will not necessarily affect the title, which is already in him. The seller is entitled to the purchase price regardless of the buyer's refusal to accept possession of the goods themselves.

For a more detailed discussion

of this whole matter see the article in 17 Mich. L. R. 283.

18—Ames, 8 Harvard L. R. 252; Street, *Foundation of Legal Liability*, Vol. II, ch. 11.

19—White v. Solomon, 164 Mass. 516.

pened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damages for such a breach would necessarily be diminished by the fact that the vendor still had the title to the goods."

A seller, therefore, who still has title to the goods is not himself entitled to the purchase price. He can sue only for damages for breach of contract, and in such case his damage is not necessarily the agreed price, but is the difference between that price and the market value of the chattel which he still owns. Thus in *Acme Food Co. v. Older*,²⁰ the defendant had contracted to buy of the plaintiff 6,000 pounds of a certain prepared poultry food. The plaintiff set aside a proper amount for the defendant, but before he could ship it to the defendant—which would, under the established rules, have passed title—the defendant repudiated his agreement. The plaintiff shipped nevertheless, but it was held too late then to pass title and although, on defendant's refusal to receive the goods or to pay for them, plaintiff sued for the whole agreed price, his recovery was limited to the difference between the purchase price and the market value.²¹

20—64 W. Va. 255, 17 L. R. A. (n. s.) 807.

21—*Bary v. Quimby*, 206 Mass. 259; *Internatl. Textbook v. Martin*, 166 Mich. 660; *Manhattan City R. R. Co. v. Genl. Elec. Co.*, 226 Fed. 173; *Gammage v. Texas*, 14 Tex. 413; *Funke v. Allen*, 54 Neb. 407, overruling a contrary *dictum* in *Lincoln Shoe Co. v. Sheldon*, 44 Neb. 249; *McCormick Harvesting Co. v. Balfany*, 78 Minn. 370, 74 Am. St. 373; *Deere v. Gorman*, 9 Kan. App. 675; *Singer Mfg. Co. v. Cheney*, 21 Ky. L. R. 550; *Moody v. Brown*, 34 Me. 107; *Tufts*

v. Grewer, 83 Me. 407; *Jones v. Jennings Bros.*, 168 Pa. 493; *Ridgley v. Mooney*, 16 Ind. Ap. 362; *Massman v. Steiger*, 79 N. J. L. 442, 75 Atl. 746; *Atkinson v. Bell*, 8 Barn. & Cr. 277; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19, "The damages recovered are not the price of the goods sold, but a compensation for the disaffirmance of the contract—Properly speaking, the seller can not recover the price—he recovers damages for the breach of a contract which was entirely executory when it was broken."

But even assuming that the seller's mere *promise to* pass the title does not create a debt on the buyer's part, a question at once arises as to whether after the buyer's refusal to proceed with the contract, the seller can *thrust* the title upon him nevertheless, and thus by his own act make himself entitled to the whole sum which the buyer has promised for the title. There is much conflict upon this point, although the best supported rule and the soundest logically is that he can not do so, but is only entitled to recover the damage he has suffered because of the buyer's refusal to take the title.

Thus, in the case of *Acme Food Co. v. Older*, just referred to,^{21a} the court said of the conflict, "It is sometimes said that the vendor in an executory contract of sale, has, on the refusal of the vendee to accept the property, an election as to whether he will treat it as his own and sue for damages for the breach, or treat it as that of the purchaser and sue for the price. * * * The classification of cases made by the text-writers is, in some instances, inaccurate. The writers seem not to have observed in all instances the distinctions and tests above mentioned. In other words, they have frequently classed cases in which the title had passed, or in which there was evidence from which the jury might have found the fact, as cases in which it had not passed. In other instances they have failed to observe that the executory contract had become executed so as to pass the title before any renunciation was made by the vendee. Indeed, there are very few cases in which the seller has been allowed to recover the purchase price when the title to the property had not passed to the buyer. The doctrine of election, when the title has not passed, seems to have grown out of an unfortunate and inaccurate interpretation of certain cases made by Mr. Sedgwick in his work on Damages."²²

21a—64 W. Va. 255, 17 L. R. A. (n. s.) 807.

22—See, for supporting author-

ity, the cases cited under note 21. "To allow the seller to re-

cover the full purchase price of an

The doctrine of election which the court criticizes and denies, whereby the seller may, if he choose, thrust the title upon the buyer against his will, is, however, widely supported by *dicta* at least. These authorities declare that a seller who has done all that he is obligated to do by the contract may sue for the purchase price even though the buyer has refused to accept the title. They do not indicate with any certainty whether the seller is allowed to sue on the theory that title has passed to the buyer despite his refusal of it, or on the theory that title need not be in the buyer in such cases. The evidence seems to point to the former.

Very little of this *dictum*, however, is real authority; that is to say, it is *dictum* simply. The proposition is usually expressed in some form of the words formulated originally in *Dustan v. McAndrew*,²³ namely, "The vendor of personal property in a suit against the vendee for not taking and paying for the property has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price, (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or, (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price."

This statement is widely quoted. As a matter of fact, however, it is seldom the basis of a *holding* that the seller can sue for the purchase price when the buyer has refused to accept the title. The case in which it was

article, and compel the buyer to accept it whether he wants it or not, is to grant specific performance of a contract for the sale of personal property in favor of the seller, when no such relief could or would be granted in favor of

the buyer. This is against the well established doctrines of courts of equity," from *Manhattan City Ry. v. Genl. Elec. Co.*, 226 Fed. 173.

23—44 N. Y. 72.

thus first stated was not, itself, a suit for the purchase price; it was only an action for damages for breach of contract. Of the two cases cited as authority, one was an action for damages only, and in the other the title had clearly passed, in accordance with the established rules of presumption, and the buyer's refusal was not a refusal to take the title, but to pay the price. This statement of the three possible remedies in cases where it is wholly unrelated to the decision, because the suit is actually for damages for refusal to accept and not for the purchase price, is common.²⁴

The statement, as wholly extraneous and immaterial matter, is found also in cases in which title *has* passed according to the established rules, and the buyer's refusal is to receive the goods themselves, not the title, and to pay the price.²⁵

In other cases the extraneous statement is made that recovery of the purchase price *would* have been allowed, despite the buyer's refusal to accept the title, *if* something else, such as the seller's failure to make tender, had not been present to prevent it.²⁶

In some cases, however, the statement is actually the principle of the holding, and a seller has been permitted to recover the purchase price for goods sold although title has been refused by the buyer. In other words, he has been allowed to thrust the title upon the buyer and thus entitle himself to the amount of the price.^{27*}

24—Habeler v. Rogers, 131 Fed. 43; Kinkead v. Lynch, 132 Fed. 692; Krebs Hop Co. v. Livesley, 59 Ore. 574; Range Co. v. Mercantile Co., 120 Mo. Ap. 438; Van Brocklen v. Smeallie, 140 N. Y. 70; Comstock v. Price, 103 Ill. Ap. 19; Magnes v. Sioux City Co., 14 Colo. Ap. 219; Trunkey v. Hedstrom, 131 Ill. 204, action in damages by buyer for seller's failure to deliver.

25—Ames v. Moir, 130 Ill. 582.

26—Moline Scale Co. v. Beed, 52 Iowa 307.

27—Crown Vinegar & Spice Co. v. Wehrs, 59 Mo. Ap. 493; Walker v. Nixon, 65 Mo. Ap. 326.

Walker Bros. v. Daggett, 115 Miss. 657, 76 So. 569.

Osgood v. Skinner, 211 Ill. 229; Rosetter v. Reynolds, 160 Ind. 133; McCormick Co. v. Market, 107

*See Uniform Sales Act, Section 63, (2), (3), 64, (4).

From the foregoing discussion it is apparent that the right of a seller, who has not passed title, to sue for the purchase price in case the buyer refuses to take title is not settled either way.

Iowa 340; *Busch v. Stromberg-Carlson Co.*, 226 Fed. 200.

It is so provided by statute in some states.

The cases of *Frisch v. Wells*, 200 Mass. 429; *Bond v. Bourk*, 54 Colo. 51, and *Smith v. Aldrich*, 180 Mass. 367, seem to have been decided on the principle that the seller could treat title as being in the buyer without his consent. The same result might have been reached, however, more harmoniously upon the principle of a promise to pay before title passed, as set out below.

The cases of *Bement v. Smith*, 15 Wend. 493 and *Shawhan v. Van Nest*, 25 O. S. 490, 18 Am. Rep. 313, are often treated as authorities for the proposition that a seller may sue for the purchase price even though the buyer has refused to accept the title. In the former case (and the latter is substantially the same) plaintiff contracted to build for the defendant a sulky according to certain description, for a price of \$80. When the work was done and the sulky offered to the defendant he refused to receive it. The plaintiff thereupon stored it with a neighbor for the defendant, and brought suit for the \$80.00. His declaration contained a count for work and labor and one for goods sold. The defense was that he was entitled to damages only. The position taken by the court was simply that the plaintiff had agreed to make and deliver a certain thing and that he had made it and tend-

ered delivery; and that the offer to deliver was tantamount to delivery. The contract, being an agreement for a thing not yet in existence, was, the court said, in accord with the New York rule, not a contract of sale but one for work and labor. The work and labor having been performed the plaintiff was entitled to the contract price. It was not necessary, the court added, for the plaintiff to have declared for goods bargained and sold. It is only after this ruling that the court remarks that "where there has been a valid contract of sale, the vendor is entitled to the full price, whether the vendee receive the goods or not. I can not see why the same principle is not applicable in this case." The *quid pro quo* which entitled the plaintiff to the debt was thus obviously not the transfer of the title, but the actual performance of agreed labor. This interpretation is strengthened by *Higgins v. Murray*, 73 N. Y. 252. This was a contract to manufacture circus tents. When they were completed and offered to defendant he refused to accept them. The maker sued to recover the price. (4 Hun. 565) The court held the contract to be one for work and labor (which would, therefore, be a *quid pro quo* for the debt) and that, consequently, the right to recover the price "did not" depend on where the technical title is, as "in the sale of goods."

2. TITLE RETAINED, BUT POSSESSION PASSED

Breach of Contract.—Where the seller has passed the *possession* to the buyer, even though it is agreed that title shall not pass to the buyer until payment has been made, the seller can still sue for damages for breach of contract in case the buyer fails to pay as agreed.

Recovery of Purchase Price.—But in such cases he may also sue the buyer for the agreed price itself, as distinct from suing to recover damages. This is different from the majority rule in cases where the seller has parted with neither possession nor title, as just discussed. The reason for this difference—that is, the reason why he can sue for the price despite his retention of title if he has given possession, but can not sue for it if he has not given possession—is not clear.

The logical reason would be that the seller in giving *possession* to the buyer has given him a *quid pro quo* by which the debt of the buyer is created. This is the theory which the courts have expressly stated in many instances.²⁸

28—This is very obvious in the case of *Burnley v. Tufts*, 66 Miss. 48. Tufts had sold to Burnley a soda water apparatus, with the express stipulation that title should not pass until the price had been paid, and that if the payment were not made at the times the installments were stated to be due the seller might retake possession of the apparatus. It does not appear that there was any stipulation that the buyer should have possession till payment or default, but that was obviously the intent of the parties. The apparatus was destroyed by fire, after several payments had been made, while in the buyer's possession but without

fault of either party. The seller sued to recover the unpaid part of the purchase price and was held entitled to the money. The court's opinion shows that *possession* was the consideration for the buyer's promise to pay, and not title, and that this consideration had been executed. "Burnley," said the court, "unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody and before the time for the payment of the last note due, on payment of which only his right to the legal title of the prop-

In other instances the seller has maintained his suit for the price without the court's having indicated any reason why he could do so. It may be that these courts have felt simply that the promise to pay, itself, created a debt and no executed consideration, or *quid pro quo*, was necessary. Or it may have been that inasmuch as pos-

erty would have occurred does not relieve him of payment of the price agreed upon. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all that he was to do except to receive the purchase price; the purchaser had received all that he was to receive as the consideration of his promise to pay." In *White v. Solomon*, 164 Mass. 516, the buyer had even refused to take possession of the chattel. Before his refusal, however, the seller had delivered it to an express company for carriage to the buyer. The buyer's contract provided that "in consideration of its delivery for me, freight prepaid, at the express office specified below, I promise to pay the sum of (the purchase price)." The court stated the general rule, that a seller who still retains title, even though only because of the buyer's refusal to accept it, is not entitled to the purchase price but only to damages. But it then went on to decide that "in the case at bar the buyer has said in terms, that although the title does not pass by the delivery to the Express Company, if it does not, delivery shall be the whole consideration for an immediate debt (partly *solvendum*

in futuro) of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. The words (in the contract) 'in consideration of its delivery' are not accidental nor insignificant. * * * If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum. * * * When, as here, all the conditions have been complied with the performance of which by the terms of the contract entitles the vendors to the whole sum, if the vendors afterward have not either broken the contract or done any act diminishing the rights given them in express words, the buyer can not by an act of his own repudiating the title gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised."

Accd., *Natl. Cash Register Co. v. Hill*, 136 N. C. 272, 68 L. R. A. 100, similar to *White v. Solomon*, and quoting it with approval; *Tufts v. Griffin*, 107 N. C. 47, following *Tufts v. Burnley*; *Natl. Cash Register Co. v. Dehn*, 139 Mich. 406; *Bierce v. Hutchins*, 205 U. S. 340; *Gray v. Booth*, 64 N. Y. App. Div. 231; *Amer. Soda Fountain Co. v. Vaughn*, 69 N. J. L. 582, "The question to be determined

session was already with the buyer the seller could, by bringing his suit for the price, elect to pass the title to the buyer and that the buyer by not actively rejecting it would be presumed to have consented to it. This passage of title would then, of course, be the necessary executed consideration.²⁹

is: What was the consideration of the note? If the passing of the title to the apparatus was the consideration, the defense must prevail. If the delivery of the apparatus, with the right to acquire title, was the consideration the plaintiff must prevail. We think the consideration for the note was the delivery of the apparatus with the right to acquire title." *Lancaster v. Southern Insurance Co.*, 153 N. C. 285; *Harley v. Stanley*, 25 Okla. 89; *Roach v. Whitfield*, 94 Ark. 448; *Lavalley v. Ravenna*, 78 Vt. 152; *Dunlap v. Grote*, 2 C. & K. 153; *Boyer v. Ausburn*, 64 Ga. 271, express agreement to pay in event of loss; *Dederick v. Wolfe*, 68 Miss. 500; *Hollenberg v. Barron*, 100 Ark. 403, even though seller had retaken possession at time of the sale; *Marion Mfg. Co. v. Buchanon*, 118 Tenn. 238; *Whitlock v. Auburn Lumber Co.*, 145 N. C. 120, 12 L. R. A. (n. s.) 1214; *Kilmer v. Money-Weight Scale Co.*, 36 Ind. Ap. 568.

29—A number of courts, apparently considering that the promise to pass title is the real consideration, refuse to allow the seller to recover the purchase price after the goods have been destroyed.

Bishop v. Minderhout, 128 Ala. 162, predicated upon the principle that the risk of loss follows title; *Randle v. Stone*, 77 Ga. 501; *Swaney v. Alstott*, 134 Iowa 63, 7 L. R. A. (n. s.) 1032; *Glisson v.*

Heggie Bros., 105 Ga. 30; *Tabbutt v. American Insurance Co.*, 185 Mass. 419, allowing the conditional buyer to recover from an insurance company only the value of his interest in the chattel and not the full value. *Sloan v. McCarty*, 134 Mass. 245. *Worden Grocery Co. v. Blanding*, 161 Mich. 254, 126 N. W. 212, holding a note given for the price, on a conditional sale, not negotiable because the buyer would not be liable if the seller could not pass title; *Fleming v. Sherwood*, 24 N. D. 144, 43 L. R. A. (n. s.) 945, *idem*.

Some courts have held that notes given for the contract price in conditional sale agreements are not negotiable because of uncertainty in the obligation of payment. This uncertainty of obligation is not, however, clearly predicated upon possibility that the buyer might not be liable. Rather, it seems to be based on the fact that the seller may not choose to hold him to payment, but may elect to retake the chattel. So long as the seller has the option, to demand payment on default or to retake the property, it is clear that the obligation to pay is not certain; the buyer may have to pay or not as the seller chooses. These cases do not, therefore, indicate that the buyer is not liable for the full purchase price regardless of title.

Bannister v. Rouse, 44 Mich.

But whatever the reason, it seems clear that a seller who has given possession to the buyer is not restricted to a recovery of damage for the buyer's failure to pay, but can bring suit for the whole agreed price.

Titular Actions.—Despite the fact that he can thus sue for the purchase price, and although he has parted with possession, the seller, because he has retained title, is still the owner in practically every respect. So long as the buyer has possession the seller can not prevent title from passing to him on performance of the condition. In this respect the seller's absolutism of ownership is limited.³⁰

In other respects the seller is the owner of the property. He can sell or otherwise transfer his right in the goods to others.³¹ He can himself maintain a titular action against a third person.³²

Recovery of Possession.—Being owner, he can retake possession from the buyer or anyone holding under him. If the buyer's contract provides that he shall have possession so long as he is not in default, the seller can not retake possession before default.³³ But if the buyer is in default the seller can retake possession, whether the contract expressly gives him that right or not.³⁴

428; *Chicago Ry. Co. v. Merchants Bank*, 136 U. S. 268; but cf. *Third Natl. Bk. v. Armstrong*, 25 Minn. 530; *Iron Wks. v. Paddock*, 37 Kan. 510.

30—See discussion of Buyer's Rights, *post*, p. 176.

31—*Everett v. Hale*, 67 Me. 497, payments by buyer to the seller are ineffective after notice that seller has transferred the title to another; *Burnell v. Marvin*, 44 Vt. 277, transferee can maintain a trover action; *Foundry Co. v. Pascagoula Co.*, 72 Miss. 608.

32—*Smith v. Gufford*, 36 Fla.

481, 51 Am. St. 37; see other authorities cited *in re* the rights of third persons.

33—*Post*, p. 176.

34—*Wiggins v. Snow*, 89 Mich. 476, even without such provision in the contract; *Ryan v. Wayson*, 108 Mich. 519, *idem.*; *Tufts v. D'Arcambal*, 85 Mich. 185, 24 Am. St. 79; *Hegler v. Eddy*, 53 Cal. 579; *Gerow v. Castello*, 11 Colo. 560, 7 Am. St. 260; *Smith v. Gufford*, 36 Fla. 481, 51 Am. St. 37, 18 So. 717; *Perkins v. Grobben*, 116 Mich. 172; *Turk v. Carnahan*, 25 Ind. Ap. 125; *Crompton v.*

There is strong authority that the seller may even use such force as is necessary to retake possession, subject, however, to criminal liability for breach of the peace. There is conflict in this regard, however.³⁵

Furthermore, where the contract provides, either expressly or by implication, that the seller may retake possession in case of default, he may do so without first giving back what he has received from the buyer.³⁶

—**After Suit for the Purchase Price.**—This right of the seller to retake possession if the conditional buyer makes default may, or may not, be affected by his having

Beach, 62 Conn. 25; Segrist v. Crabtree, 131 U. S. 287; Seanor v. McLaughlin, 165 Pa. 150; Walsh v. Taylor, 39 Md. 598; Palmer v. Kelly, 56 N. Y. 637, buyer had failed to keep property insured as contract provided.

35—W. T. Walker Furniture Co. v. Dyson, 32 App. D. C. 606, 19 L. R. A. (n. s.) 606, annotated.

36—Tufts v. D'Arcambal, 85 Mich. 185, 24 Am. St. 79; Perkins v. Grobбен, 116 Mich. 172; Crompton v. Beach, 62 Conn. 25; Lippincott v. Rich, 22 Utah, 195; Duke v. Shackelford, 56 Miss. 552; Pfeifer v. Norman, 22 N. D. 168, 38 L. R. A. (n. s.) 891; Raymond Co. v. Kahn, 124 Minn. 426; Fairbanks v. Malloy, 16 Ill. Ap. 277, because the retaking is not strictly a rescission. Fleck v. Warner, 25 Kan. 492; Hawkins v. Hersey, 86 Me. 394, even in an action for trover. Even in an action for conversion by a third person, in privity with the buyer, the defendant can not set off payments made and the seller is entitled to the full value of the chattel, Lorain Steel Co. v. Norfolk, etc. Ry. Co., 187 Mass. 500.

Contra, Hays v. Jordan, 85 Ga. 741.

Seller need not give up notes received for future payments, Kirby v. Tompkins, 48 Ark. 273; Hoe v. Rex Mfg. Co., 205 Mass. 214.

This right to retake possession without returning what the buyer has paid has been changed by statute in some states.

By thus retaking possession without refunding money paid the seller does not necessarily put an end to the contract. Tufts v. D'Arcambal, 85 Mich. 185, 24 Am. St. 79.

If the seller does intend by his retaking of possession to rescind the contract, it appears that the buyer may then sue to recover the money he has paid. Miller v. Steen, 30 Cal. 402, "If the contract has been rescinded, the plaintiffs (buyers) are entitled to recover the money paid. If the contract was not rescinded, the vendees became entitled to the possession upon payment of the full amount due."

See further, *post*, p. 103.

first brought suit for the purchase price. The courts are anything but harmonious in regard to it. If the right to sue for the purchase price is itself based, as we have seen that many courts do base it, on the assumption that possession until default is the *quid pro quo* for the promise to pay the price, and that title was not to pass till after payment, then title should not pass merely because a suit for the price has been started, or a judgment secured. Title, then, being still in the seller and the condition on which the buyer's possession depends having been broken, there is no logical reason why the seller should not be allowed to retake possession. Many courts do hold, for one reason or another, that the seller is not precluded from retaking possession merely because he has started a suit, or even secured a judgment, for the purchase price.³⁷

Courts which put the seller's right to sue for the price, as such, instead of for damages, on the theory that he has elected to pass title to the buyer, do not, as a rule, allow the seller to retake possession after such a suit, even though the judgment has not been satisfied. Logically, having passed title, the seller has lost his right to repossession.³⁸

37—*Matthews v. Lucia*, 55 Vt. 308; *Fuller v. Byrne*, 102 Mich. 461; *Canadian Co. v. Macgurn*, 119 Mich. 533; *Campbell, etc. Co. v. Rockaway Co.*, 56 N. J. L. 676, distinguishing *Heller v. Elliott*, 44 N. J. L. 467, on the point that in the latter case the seller had levied upon the goods, under his judgment, as being the buyer's property; *Forbes Co. v. Wilson*, 144 Ala. 586, overruling a contrary *dictum* in *Davis v. Millings*, 141 Ala. 378; *Thomason v. Lewis*, 103 Ala. 426; *Rossiter v. Merriman*, 80 Kan. 738, analogy of suit on a note as not releasing a mortgage.

Cf. *Meyer v. Pacific Machinery*

Co., 244 Fed. 730, holding that right to possession had not been lost by prior action in equity for declaration of a lien in seller's favor; *Ratchford v. Cuyahoga, etc. Co.*, 145 N. Y. S. 83, seller not precluded by suit for *part* of price from setting up title as against a mortgagee of the buyer; *Hobart Elec. Co. v. Rooder*, 121 N. Y. S. 274, suit for *part* of price does not preclude action in conversion against buyer.

38—*Turk v. Carnahan*, 25 Ind. App. 125; *Crompton v. Beach*, 62 Conn. 25; *Frisch v. Ells*, 200 Mass. 429; *Bailey v. Hervey*, 135 Mass. 172; *Francis v. Bohart*, — Ore.

In other cases repossession by the seller, after suit for the price, is denied without statement of *any* definite theory.³⁹

A way of escape for the seller from this proposition that if he brings suit for the price he forfeits his right to retake possession even though the judgment is not satisfied, is suggested in *Fuller v. Byrne*.⁴⁰ The *contract* there provided that title should not pass to the buyer until payment *or until satisfaction of any judgment recovered*. The court held that suit for the price and an *unsatisfied* judgment did not preclude the seller from retaking possession.⁴¹ The decision must mean that this court considers the passing of title to be an effect of the suit, but not a condition precedent to suit for the price.

A suit to recover *installments* due does not have the same effect as a suit to recover the whole price, and the seller does not, in most jurisdictions, lose his right to retake possession because of a suit to recover installments.⁴²

L. R. A. 1916 A 922, "An action for the purchase price of the property is an action on the contract, and necessarily proceeds upon the theory that the title has been waived by the seller and vested in the buyer"; *Parke Co. v. White River Co.*, 101 Cal. 37, suit is "a ratification of the sale"; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, an "election to treat the transaction as an absolute sale."

39—*Seanor v. McLaughlin*, 165 Pa. 150; *Manson v. Dayton*, 153 Fed. 258; *Ramey v. Smith*, 56 Wash. 604; *Chase v. Kelly*, 125 Minn. 317, *dictum*; *Bell v. Old*, 88 Ark. 99; *Elwood State Bank v. Mock*, 40 Ind. Ap. 685; *Button v. Trader*, 75 Mich. 295; *Dowagiac Mfg. Co. v. Mahon*, 13 N. D. 516;

Mchts. etc. Bk. v. Thomas, 62 Tex. 237.

40—102 Mich. 461.

41—In the absence of such a provision, an unsatisfied judgment for the price was held to preclude repossession by the seller in *Bul-ton v. Trader*, 75 Mich. 296.

42—*Haynes v. Temple*, 198 Mass. 372; compare *lais* with *Frisch v. Wells*, 200 Mass. 429, 23 L. R. A. (n. s.) 144, to the effect that suit for the whole price does end the right of repossession. *Ratchfield v. Cayuga, etc. Co.*, 145 N. Y. S. 83, affirmed 217 N. Y. 565; *Silverstein v. Kohler*, 58 Cal. Dec. 138, 183 Pac. 451.

Contra. *Ellers Music House v. Douglass*, 90 Wash. 683, L. R. A. 1916 E. 613.

—**After Other Acts.**—Even in jurisdictions where suit for the price is not held to indicate a passing of title to the buyer, the seller's intent to treat it as having passed may be shown in other ways, as by attaching the goods, or levying upon them as the property of the buyer. When he has so elected to treat them as the property of the buyer he can not afterward repudiate that election and retake possession.⁴³

Suit for Price After Retaking Possession.—If the seller, instead of suing for the price, chooses to retake possession, the cases are well agreed that he loses his right to sue for the price. The theory on which this forfeiture of the price is based is not so well settled, however. A number of courts put it on the ground that the seller's right to retake the goods is by way of rescinding the contract. Accordingly, if he has so retaken possession, he must have rescinded and there is in consequence no contract on which he can bring a suit. They apply this even when the suit is on a promissory note given for the price.⁴⁴ This theory is hardly consistent with the rule

43—*Elson v. Moore*, 11 Cal. Ap. 377, suit and attachment; *Heller v. Elliott*, 44 N. J. L. 467, levy; *Ramey v. Smith*, 56 Wash. 604, levy; *Orcutt v. Rickenbrodt*, 59 N. Y. S. 1008, acceptance of a promissory note as payment of the price; *Fuller v. Eames*, 108 Ala. 464, attachment; *Albright v. Meredith*, 58 O. S. 194, levy.

Other cases may be distinguished on various grounds. Thus *Moline Plow Co. v. Rodgers*, 53 Kan. 743, 37 Pac. 111, appears to be a case in point. As a matter of fact the court held, as regards part of the goods in controversy, that the title to the goods had passed by mutual agreement with an option in the seller to retake

title in case of non-payment or to affirm it in the buyer. In such case, it was held, suit for the price was an affirmance of the buyer's existing but voidable title.

44—*Glisson v. Heggie Bros.*, 105 Ga. 30. In *Turk v. Carnahan*, 25 Ind. Ap. 125, the court expresses the matter thus:—"The contract sued on is a conditional one. The condition is that the title to the property sold, as described in the note, shall remain in the vendors (appellees) until the purchase money is fully paid. The title to the property never passed from appellees, and therefore never vested in appellant. * * * Upon default of the vendee to pay, as provided in the contract, the vendor has two remedies: 1. He may

that the seller can retake without first giving back what he has received, as he should do were it a true rescission.

Other courts follow a theory harmonious with the idea that possession by the buyer is the real consideration for his promise to pay. They hold that the seller can not recover the price after he has retaken the goods because through termination of the buyer's possession there has occurred a failure of consideration.⁴⁵

Still other courts say, without any express reason, that the remedies are inconsistent and retaking precludes suit for the price.⁴⁶

Underlying Theory.—From all this conflict of authority no one, clear cut dispute of principle, much less any established principle, can be deduced. The decisions are, many of them, too vague for it to be shown conclusively that those on the one side hold to one definite, clear

retake the property, which is a disaffirmance of the sale; or 2. He may treat the sale as absolute and bring an action for the price. The undisputed facts in this case show that the appellees elected to disaffirm the contract, and took possession of the property described in the note. Having asserted their right to disaffirm the contract, and having taken possession of the property under such disaffirmance, appellees thereby abandoned their right to treat the sale as absolute and sue for the price. The law will not permit a vendor of property who retains the legal title in himself to take possession of it upon default of payment, sell, or otherwise dispose of it, and then sue the vendee for the balance of the purchase price."

45—*McBryan v. Universal Elevator Co.*, 130 Mich. 111; *Perkins v. Grobbsen*, 116 Mich. 172; *Minne-*

sota Harvester Works v. Holly, 27 Minn. 495; *Aultman & Co. v. Olson*, 43 Minn. 409; *Keystone Mfg. Co.*, 74 Minn. 115; *Earle v. Robinson*, 36 N. Y. S. 176.

But, in accord with this theory, if the buyer has had possession for the agreed time before it was taken from him, the seller can recover, *Equitable etc. Co. v. Potter*, 48 N. Y. S. 647.

46—*Crompton v. Beach*, 62 Conn. 25; *Loomis v. Bragg*, 50 Conn. 228; *Seanor v. McLaughlin*, 165 Pa. 150; *Edmead v. Anderson*, 103 N. Y. S. 369; *Campbell Press Co. v. Henkle*, 19 D. C. 95; *Green v. Sinker, Davis & Co.*, 135 Ind. 434.

Contra. *Dederick v. Wolfe*, 68 Miss. 500, on theory that retaking was not a rescission, but merely a taking of possession by way of security; *McDaniel v. Chiaramonte*, 61 Ore. 403, *idem*.

theory and those on the other side believe positively in a converse of that theory. But from a general survey of the whole there is little doubt that the division is caused, however vague the motivating idea may be in any particular case, by disagreement as to whether the transfer of title is the consideration for the promise to pay, even though the transfer is to be made only after payment, or whether something else, such as the possession of the property, is the consideration for the price and the transfer of title merely a condition subsequent. If possession, for instance, is the consideration, the seller ought logically, when he has executed that consideration, to be permitted to sue for the price, whether he has passed title, or can pass it, or not. Correlatively, if he has sued for the price, such suit should not necessarily indicate that he thereby passed title, and he ought still to be allowed to retake possession. On the other hand, if title is the consideration for the price, he could not logically sue for the price without having passed title, with or without the buyer's assent. Having so sued, and thus shown an election to treat title as passed, he could not logically be thereafter allowed to retake possession by asserting title in himself.

The real conflict appears to be, therefore, whether, in the absence of any clear expression, the courts will treat the possession or the title as the real consideration and will assume the buyer's agreement to be a promise to pay in consideration of the possession, with passing of title as a condition subsequent, or a promise to pay in consideration of the title, with possession as a condition precedent.

Some, at least, of the apparent conflict within jurisdictions may be due to the fact that in a particular case there is enough evidence of a *real* intent to overcome the customary judicial presumption.⁴⁷

47—Thus in Massachusetts it has been held that a conditional

3. POSSESSION RETAINED, BUT TITLE PASSED

Recovery of Price.—A seller who has parted with title is himself entitled to the purchase price, and may sue for it, in an action of debt or *indebitatus assumpsit*, accordingly.* This action can not be maintained, however, if the seller has given credit, until the period of credit has expired. Until that time the seller is not entitled to payment of the sum, as a debt, and there is no breach of contract on the part of the buyer in failing to pay it. Even the refusal of the buyer to accept the goods as tendered, or his becoming insolvent, obviously can not advance the date at which the seller was to become entitled to the purchase price and he can not therefore sue for it before that time.⁴⁸

But if the credit was obtained by fraud it is sometimes held that the seller is allowed to rescind so much of the contract as appertains to the credit, while treating that part which pertains particularly to the transfer of title and the price as still in force. In such case he may sue for the price just as though no credit had been

seller who had brought suit for the purchase price could not thereafter retake possession, *Bailey v. Hervey*, 135 Mass. 172, and that such a seller could not recover the purchase price after destruction of the property, *Tobbut v. Amer. Ins. Co.*, 185 Mass. 419. Yet the same court has held that a conditional seller could recover the full amount of the purchase price without having passed title, *White v. Solomon*, 164 Mass. 516. This may well be explained on the ground that the courts of Massachusetts will not presume that in an ordinary conditional sale the possession is the consideration for the price, but that in *White v. Solomon* the delivery to the car-

rier was *expressly stated* to be the consideration. Compare also, *Helmer v. Elliott*, 44 N. J. L. 467 and *Campbell etc. Co. v. Rockaway Co.*, 56 N. J. L. 676; *Holt Mfg. Co. v. Ewing*, 109 Cal. 353, and *Matte-son v. Equitable Mining Co.*, 143 Cal. 436; *Forbes Co. v. Wilson*, 144 Ala. 586; *Alexander v. Mobile Auto Co.*, 200 Ala. 586, 76 So. 944.

48—*Tatum v. Ackerman*, 148 Cal. 357, 113 Am. St. 276; *Brady v. Isler*, 9 Lea (Tenn.) 356; *Bradford v. Marbury*, 12 Ala. 520; *Keller v. Strasburger*, 90 N. Y. 379; *Girard v. Taggart*, 5 Serge & Rawle (Pa.) 19; *Dutton v. Solomonson*, 3 Bos. & Pul. 582; *Mussen v. Price*, 4 East. 147.

*See Uniform Sales Act, Section 63, (1).

given.⁴⁹ Other courts, however, more logically, hold that the matter of credit is an intrinsic part of the contract of sale and that the contract must be rescinded as a whole, or not at all, and that therefore the seller can not sue for the purchase price before the period of credit has expired, even in cases of fraud.⁵⁰

Breach of Contract.—Of course, if the buyer refuses to pay the price when due, the seller can, if he chooses, sue to recover damages for breach of the contract instead of suing in debt for the price itself.

But where title has already passed and the buyer merely refuses to receive the possession, the damage to the seller from that refusal itself is slight, if anything. This refusal, however, may and presumably does indicate an intent on the buyer's part not to pay when payment becomes due. It may amount, therefore, to an anticipatory breach. The buyer can not be said to have broken his promise to pay, since the time for payment has not arrived. He may be said, however, to have impliedly announced that he will not pay when the time does come; in other words, to have committed an anticipatory breach of the contract. If this is the fair implication, he may be sued at once for damages resulting from his breach, in most jurisdictions.^{51*}

49—Heillbronn v. Herzog, 165 N. Y. 98; Willson v. Force, 6 Johns. (N. Y.) 110; Joffray v. Wolf, 4 Okla. 303.

50—Jones v. Brown, 167 Pa. 395.

51—Nichols v. Scranton Steel Co., 137 N. Y. 471; Engesett v. McGilvray, 63 Ill. Ap. 461; in Orr v. Leathers, 27 Ind. Ap. 572, it was held that on the buyer's refusal to give promissory notes as agreed, the seller need not wait for the expiration of the credit but

might at once sue *for damages for breach of the agreement to give "security,"* i. e., the notes. It was further held that the damage from this failure to give the notes was "the whole damages equal to the value of the security had it been given, *prima facie* the amount of the sum secured." (Author's italics). Citing 2 Sutherland on Damages (2d Ed.) sec. 644.

Cook v. Stevenson, 30 Mich. 242; Hanna v. Mills, 21 Wend. (N. Y.)

*See Uniform Sales Act, Section 51.

Seller's Lien.—When the title has passed to the buyer, but the seller has retained possession, he, the seller, has a right, unless he has given credit to the buyer, to keep that possession till payment.

This right to retain possession till payment is called a *seller's*, or *vendor's*, *lien*.^{52*} It has nothing to do with the right of an owner to retain possession of *his own* goods. It is independent of title. Indeed a seller's lien exists only when title has passed out of the seller. Its existence "always presupposes that title to the goods has passed to the vendee; since it would be an incongruous conception that a vendor might have a lien on his own goods."⁵³

The seller's right of continued possession, until payment, is effective even against a purchaser for value from the original buyer.⁵⁴

90; *Manufacturing Co. v. Cereal Co.*, 124 Iowa 737.

As analogous issues in cases not involving sales, *Wolf v. Marsh*, 54 Cal. 228; *Hosmer v. Wilson*, 7 Mich. 294; *Chapman v. Kansas City R. R.*, 146 Mo. 481; *Burtis v. Thompson*, 42 N. Y. 246; *Frost v. Knight*, L. R. 7 Ex. 111; *Inchbold v. Western etc. Co.*, 17 C. B. (n. s.) 733; *Ford v. Tiley*, 6 B. & Co. 325.

Contra, *Daniels v. Newton*, 114 Mass. 530; *King v. Waterman*, 55 Neb. 324.

52—*Conrad v. Fisher*, 37 Mo. Ap. 353, 382; *Burke v. Dunn*, 117 Mich. 430; *Hoskins v. Warren*, 115 Mass. 514; *Perrine v. Barnard*, 142 Ind. 448; *Sparger v. Huffman*, 15 Ky. L. R. 848; *Cragin v. O'Connell*, 63 N. Y. 1071.

53—*Conrad v. Fisher*, 37 Mo. Ap. 352, 8 L. R. A. 147; *Perrine v. Barnard*, 142 Ind. 448; *Arnold v. Delano*, 4 Cush. (Mass.) 33,

"The term *lien* imports, that by the contract of sale, and a formal symbolical or constructive delivery, the property has vested in the vendee; because no man can have a lien on his own goods. The very definition of a lien is, a right to hold goods, the property of another in security for some debt, duty or other obligation. If the holder is the owner the right to retain is a right incident to the right of property * * *."

This is not, however, always kept clearly in mind by some courts, with a resultant confusion of idea. See *Post*, p. 114.

54—*McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302; *Robinson v. Morgan*, 65 Vt. 37; *Vogelsang's Admr. v. Fisher*, 128 Mo. 386; *Ware River R. R. Co. v. Vibbard*, 114 Mass. 447; *R. R. Co. v. Plant*, 45 Mo. 517; *Perrine v. Barnard*, 142 Ind. 448; *Dixon v. Yates*, 5 B. & Ad. 313.

*See Uniform Sales Act, Section 54, (1).

—**Effect of Loss of Possession.**—There is no seller's lien, however, unless the title has passed to the buyer without a transfer of possession. That is to say, the right to keep possession of the goods until payment depends upon the fact that the seller has already steadfastly retained possession despite the change of title. By delivering actual possession of the goods to the buyer the seller loses his right to any further possession, whether he has been paid or not.⁵⁵

But delivery of mere *constructive* possession to the buyer does not affect the seller's lien. If he has retained the actual possession, his right to continue in possession is not impaired. In *Woodland Co. v. Mendenhall*,⁵⁶ for instance, the seller sold copper wire to the defendant and strung the wire on the defendant's poles. The seller Company, however, was operating the defendant's railroad at the time and therefore had physical possession of the defendant's poles and other property. The court accordingly said that while constructive possession of the wire might have passed to the buyer by virtue of attachment to its poles, yet as the poles themselves were in the actual possession of the seller, the actual possession of the wire had also been retained by the seller and therefore its seller's lien still existed. In another case⁵⁷ the plaintiff had sold to one Dewey a number of barrels of whiskey then stored in a bonded warehouse. As part of the contract plaintiff was obliged to ship the whiskey to the buyer when and as ordered. Notice of the sale was given to the warehouse man and he

55—*Haskins v. Warren*, 115 Mass. 514; *Sparger v. Huffman*, 15 Ky. L. R. 848; *Meyers v. McAllister*, 94 Minn. 510; *Pickett v. Bullock*, 52 N. H. 254, "Possession is not only essential to the creation, but also to the continuance of a lien; and when the party voluntarily parts with the possession of the property upon which

the lien has attached, he is divested of the lien."

Statutes in some states provide for certain rights of repossession by the seller even after he has transferred possession. See *Jones, Liens*.

56—82 Minn. 483.

57—*Mohr v. Boston & Albany R. R. Co.*, 106 Mass. 67.

thereupon certified that he held the whiskey for the buyer, Dewey, as owner. The court held that even under these circumstances Dewey had acquired only a constructive possession and not an actual one.^{58*}

Whether or not there has been an actual delivery of possession to the buyer, as distinct from a merely constructive one, has been said to be a question of fact for the jury if the facts from which it is to be determined are themselves uncertain.⁵⁹ The great majority of courts, however, treat it, without comment, as a question to be decided by the court itself.

—**Delivery to Carrier.**—Since a carrier to whom goods have been given for transportation is treated as the agent of the buyer in so many ways, such as to assent to the passing of title and as to make the buyer liable for goods sold and delivered, it is a logical assumption that by delivery to a carrier, without express restriction, the seller loses his lien. The seller would have parted with possession, not merely constructively, but actually, to an agent of the buyer. The case would rarely arise in practice, however. The fact that goods were

58—The seller's lien is not lost "by any species of constructive delivery, so long as he (the seller) retains the actual custody of the goods, either by himself, or by his own agent or servant", *Conrad v. Fisher*, 37 Mo. Ap. 352, 8 L. R. A. 147, citing many authorities. *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302; *Arnold v. Delano*, 4 Cush. (Mass.) 33; *Vogelsang's Admr. v. Fisher*, 128 Mo. 386; *Thompson v. Baltimore & Ohio R. R.*, 28 Md. 396, 407, "In all cases of symbolical delivery, which is the only species of constructive delivery sufficient to give a final possession to the ven-

dee, it is only because of the manifest intention of the vendor utterly to abandon all claim and right of possession, taken in connection with the difficulty or impossibility of making an actual and manual transfer, that such a delivery is considered as sufficient to annul the lien of the vendor." *Miles v. Gorton*, 2 C. & M. 504, goods stored by seller at buyer's cost.

Delivery of negotiable warehouse receipts so far passes possession to the buyer as to preclude a lien in the seller, *Rummel v. Blanchard*, 216 N. Y. 348.

59—*Conrad v. Fisher*, 37 Mo. Ap. 352.

*See Uniform Sales Act, Section 54, (2).

shipped without payment would indicate that credit had been given. This credit would be a defense to a claim of lien, without raising any issue of possession. On the other hand, if the credit had been lost by insolvency, a right of stoppage *in transitu* would exist and it would be unnecessary to assert any claim of a lien.

Of course, if the goods have been delivered to a carrier with directions not to give possession to the buyer until payment—the ordinary “C. O. D.” shipment—the lien would not be lost, as the carrier would clearly not be the buyer’s agent for possession.

—**Loss of Possession Due to Fraud.**—It is said by some writers upon the subject that a seller’s lien is not lost, as between the parties at least, even though the buyer has obtained possession of the goods, if the possession was secured by fraud. This appears reasonable, but the cases cited to support these statements do not actually bear them out. In each case there is a confusion between the ideas of title and of seller’s lien, and it appears that the seller’s right to regain possession was based upon the retention of *title* till payment, rather than upon a true lien.^{60*}

—**Loss of Possession for a Special Purpose.**—It is also said that the lien is not lost by mere delivery of possession to the buyer for some specific purpose, such as

60—Jones on Liens, sec. 830; Williston on Sales, sec. 511; Meechem Sales, sec. 1488; Woolsey v. Axton & Son, 192 Pa. 526; Bush v. Bender, 113 Pa. 94. In McGill v. Chilhowee Lumber Co., 111 Tenn. 552, 82 S. W. 210, it is said specifically that the seller’s *lien* was not lost merely because the buyer had *wrongfully* disposed of the property. Almost in the next breath it is

strongly implied that *title* had not passed from the seller, the court saying, “It is very clear that until the (buyer) had the right of possession it could not communicate a title to any purchaser.” However, as the court had held, in another connection, that the risk of loss was not upon the seller, as owner, this case does support the proposition.

*See Uniform Sales Act, Section 56, (1).

inspection. But here again the cases are confused in their stated ideas of a lien, and indicate that the seller's right to repossession is really based upon the fact that he retained *title* until payment. And as we have already seen, title, if retained till payment, is in no wise affected by delivery of possession to the buyer. It is therefore at least somewhat doubtful if a seller who has really parted with title has any right to a seller's lien after he has deliberately parted with possession to the buyer, for any purpose.⁶²

—**Loss of Possession of Part of the Goods.**—Delivery of possession of part of the goods terminates the lien upon that part, but the lien on the part retained is valid to the extent of the entire purchase price due. Again, however, the authority is scanty.^{63*}

—**Effect of Giving Credit.**—The seller's lien is predicated upon the assumption that, though the parties intended to pass title at once, they also intended that delivery of possession should be concurrent with payment. Since the lien thus depends on intention, there will be no lien if the parties appear to have intended that

62—Palmer v. Hand, 13 Johns. (N. Y.) 432, "Where no credit is stipulated for, the vendor has a lien, so that if the goods be actually delivered to the vendee, and upon demand then made he refuses to pay, the property is not changed, and the vendor may lawfully take the goods as his own, because the delivery was conditional." Russell v. Minor, 22 Wend. (N. Y.) 662, "the delivery is conditional and does not become complete so as to change the right of property until the condition is complied with, * * * and the vendor does not thereby part with his

lien upon the property." Morris v. Rexford, 18 N. Y. 555; Ames v. Moir, 130 Ill. 582; Haskins v. Warren, 115 Mass. 514; Lamb v. Utley, 146 Mich. 654; Caldwell v. Tutt, 10 Lea (Tenn.) 258.

63—Williams v. Moore, 5 N. H. 235; Wanamaker v. Yerkes, 70 Pa. 443, confuses title and lien; McElwee v. Metropolitan Lumber Co., 69 Fed. 302; McFarland v. Wheeler, 26 Wend. (N. Y.) 467; Dixon v. Yates, 5 B. & Ad. 313, 341; Bolton v. L. & Y. R. R. Co., L. R. 1 C. P. 431; Ex parte Cooper, 11 Ch. Div. 68.

*See Uniform Sales Act, Section 55.

possession should pass before payment. So, if the seller has given the buyer credit, without expressly stipulating for retention of possession, it is presumed that he intended the buyer to have possession without concurrent payment. As Chief Justice Shaw put it, "A lien for the price is incident to the contract of sale, when there is no stipulation therein to the contrary, because a man is not required to part with his goods until he is paid for them. But *conventio legem vincit*; and when a credit is given by agreement, the vendee has a right to the custody and actual possession, on a promise to pay at a future time. He may then take the goods away, and into his own actual possession; and if he does so, the lien of the vendor is gone, it being a right incident to the possession."⁶⁴

—**Expiration of Credit.**—If the buyer does not take advantage of his right of possession, but leaves the seller in possession until the period of credit has expired, then a seller's lien arises and payment becomes a condition precedent to the buyer's right of possession.⁶⁵

—**Insolvency of Buyer.**—The lien arises likewise, even before the period of credit has expired, if the buyer

64—Arnold v. Delano, 4 Cush. (Mass.) 33; Robinson v. Morgan, 65 Vt. 37; Cutler v. Pope, 13 Me. 377; Conrad v. Fisher, 37 Mo. Ap. 352, 382; Pickett v. Bullock, 52 N. H. 354, "The right of lien is to be deemed to be waived when the party enters into a special agreement inconsistent with the existence of the lien or from which a waiver of it may be fairly inferred."

65—Robinson v. Morgan, 65 Vt. 37; McKelwee v. Metropolitan Lumber Co., 69 Fed. 302, "Delivery (by the seller) could not be refused unless one of two things should

occur before the actual possession was surrendered, namely, insolvency of the buyer or non-payment of the price when the credit expired. In the case of the happening of either of these contingencies before the actual possession of the lumber passed from the seller to the buyer, the vendor's lien which had been waived by a sale on credit, would revive, and the vendor might lawfully retain his possession until the price was paid." This case even went so far as to say, if not to hold, that the revived lien was not in turn waived by a fresh term of credit.

becomes insolvent before he has taken actual possession. Hence a buyer who has become insolvent can not have possession, against the seller's will, even though he demands it before the original period of credit has expired. In the words of one court,⁶⁶ "When the sale is upon credit, it is one of the implied conditions of the contract that the vendee shall keep his credit good; his promise to pay at a future day, involving an engagement on his part that he will remain, and then be, able to pay; which engagement is broken when he becomes insolvent, and unable to pay, and hence the right of the vendor to stop performance of the contract on his part. * * * It is true that, at that time (when payment is due) the vendee may again be solvent, and able to pay. There is no presumption, or assurance, that he will. If any presumption arises, it is rather, that the insolvency will continue, which is more in accordance with the experience of the commercial world."⁶⁷ It makes no difference that the seller has accepted the buyer's notes or other evidences of indebtedness for the purchase price. It is a general principle that notes given and received are merely a form of evidencing the debt and are intended as such rather than as payment. In such case the obligation of the buyer to keep his credit good is unchanged, and his becoming insolvent entitles the seller to retain possession of the goods until actual payment.⁶⁸ If the notes

66—*Diem v. Koblitz*, 49 O. S. 41.

67—*Bohn Mfg. Co. v. Hynes*, 83 Wis. 388, "Although, generally, the purchaser of goods on credit is entitled to the immediate possession of them, that right is defeated if he becomes insolvent before he obtains actual possession; in such case the vendor may retain the goods and enforce his lien thereon for the unpaid purchase money. If, however, the purchaser obtains the actual possession of the goods, the lien is

gone, notwithstanding his insolvency." *Thompson v. Baltimore & Ohio R. R. Co.*, 28 Md. 396; *White v. Welsh*, 38 Pa. 396; *Vogelsang's Admr. v. Fisher*, 128 Mo. 386; *Tuthill v. Skidmore*, 1 N. Y. S. 445; *Pratt v. S. Freeman & Sons Co.*, 115 Wis. 648, and fact that buyer again becomes solvent does not reinstate his credit, seller's lien continues; *Dixon v. Yates*, 5 B. & Ad. 313.

68—*Bohn Mfg. Co. v. Hynes*, 83 Wis. 388; *Thompson v. Baltimore*

or other instruments have in fact been accepted *in payment* of the indebtedness there will of course be no lien in case of insolvency. The buyer having *paid* the seller, the latter has no claim against him under the contract of sale.^{69*}

The fact that the buyer's insolvency existed before the contract of sale was entered into does not affect the seller's lien, if he did not know of the insolvency. "If there be a want of ability to pay, it can make no difference, in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the sale."⁷⁰ But if the seller knew of the buyer's insolvency at the time of the contract he would be held to have made the contract with that in mind and, by giving credit nevertheless, to have waived any right to possession.

—**Evidence of Insolvency.**—To prove a buyer's insolvency "it is not necessary that he should have been declared a bankrupt or insolvent by a judicial tribunal, nor that he should have made an assignment of his property. If the fact exist, no matter how proved, if sufficiently and satisfactorily proved, the law requires no more."⁷¹ Insolvency "means a general inability to pay, evidenced by the stoppage of payment,"⁷² and it may be proved by circumstances, such as the disappearance of the buyer and the protest or mere non-payment of his

& Ohio R.R., 28 Md. 396; Vogel-sang's Admr. v. Fisher, 128 Mo. 386; Tuthill v. Skidmore, 1 N. Y. S. 445; Diem v. Koblitz, 49 O. S. 41.

69—Wisconsin Ins. Co. v. Filer, 83 Mich. 496.

70—Loeb & Bro. v. Peters, 63 Ala. 243, 248; Benedict v. Schaettle, 12 O. S. 515; Reynolds v. Rail-

road, 43 N. H. 580; Crummey v. Raudenbush, 55 Minn. 426; Lancaster Co. Bank v. Huver, 114 Pa. 216.

71—Benedict v. Schaettle, 12 O. S. 515, 523, quoting from Hays v. Morille, 14 Pa. 48.

72—Chandler v. Fulton, 10 Tex. 2.

*See Uniform Sales Act, Section 52, (1), (2).

notes.⁷³ Indeed, it is said that "Actual insolvency of the vendee is not essential. It is sufficient if before the stoppage *in transitu*, he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary apparent evidences of insolvency."⁷⁴

But a mere doubt of the buyer's solvency, though based on adverse reports from a credit agency, will not justify a refusal to deliver possession during the term of credit.⁷⁵

—**Effect on Lien of Suit for Price.**—The lien is not lost by a seller's efforts to enforce payment of the price as agreed. Thus he may receive a part payment,⁷⁶ or secure a judgment,⁷⁷ or even satisfy in part a judgment for the price,⁷⁸ without destroying his right to retain possession till paid the whole price. The judgment is not a settlement of the contract obligation, but a mere change in its form. The right to possession is not lost by proving a claim for the purchase price with the buyer's assignee in bankruptcy,⁷⁹ nor with the administrator of his estate.^{80*}

—**Effect of Receiving Security.**—Neither is the lien lost because the seller has received other, additional,

73—Tuthill v. Skidmore, 1 N. Y. S. 445; Reynolds v. Railroad, 43 N. H. 580; Crummey v. Raudenbush, 65 Minn. 426.

74—Diem v. Koblitz, 49 O. S. 41.

75—Jewett Pub. Co. v. Butler, 159 Mass. 517; Kavanaugh Mfg. Co. v. Rosen, 132 Mich. 44, 92 N. W. 788.

76—*Ante*, p. 115.

77—Rhodes v. Mooney, 43 O. S. 421; Waschow v. Waschow, 155 Ill. Ap. 167.

78—Schrivener v. Gt. No. R. R.

*See Uniform Sales Act, Section 56, (2).

Co., 19 Weekly Rep. 388, A sold goods to B and shipped them to him by carrier, C. O. D. B refused to accept and A recovered a judgment for the price which was paid in part. B then claimed possession from the carrier and sued in detinue. The carrier was held to be A's agent and, as such, entitled to possession by virtue of A's lien which had not been destroyed.

79—Conrad v. Fisher, 37 Mo. Ap. 352; Rhodes v. Mooney, 43 O. S. 421.

80—Waschow v. Waschow, 155 Ill. Ap. 167.

security for the debt, unless the facts are such as to show that acceptance of the other security was inconsistent with the idea of a lien.⁸¹

—**Effect of Seller's Attaching the Goods.**—It seems probable that the seller will lose his lien if he attaches the goods or levies a judgment against them. There is, however, a conflict of opinion upon this. His loss of the lien is placed on the ground that, "A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution, the defendant might have insisted on his lien. But Messer (the lienor) himself called on the sheriff to sell; he set up no lien against the sale; on the contrary, he thought his best title was by virtue of that sale. Now, in order to sell, the sheriff must have had possession; but after he had possession from Messer, and with his assent, Messer's subsequent possession must have been acquired under the sale, and not by virtue of his lien."⁸² This case was reviewed, with others, in *Lambert v. Nicklass*,⁸³ and a contrary decision reached, on the theory that a lienor might properly hold possession by an agent and that the sheriff was to be looked upon as an agent of the lienor so far as concerned possession.⁸⁴

—**General Principles.**—These cases, holding that where title has passed a suit or judgment for the price does not affect the seller's right to possession, must be kept distinct from the holding that where possession has passed, but title has been retained till payment, a suit for

81—*Smith v. Greenop*, 60 Mich. 61; *Kimball v. Costa*, 76 Vt. 289; *Angus v. MacLachlan*, 23 Ch. Div. 330; *In re Taylor* [1891], 1 Ch. Div. 590.

82—*Jacobs v. Latour*, 5 Bing. 130.

83—45 W. Va. 527.

84—Lien lost by attachment, *Lawrence v. McKenzie*, 88 Iowa 432; *City National Bank v. Crahan*, 135 Iowa 230; *Evans v. Warren*, 122 Mass. 303; *Wingard v. Banning*, 39 Cal. 543, because the attachment required an affidavit that the demand was not secured by any lien.

the purchase price has the effect of passing title.⁸⁵ The bases of the two propositions are entirely different, but one does occasionally find a tendency even in judicial utterance to confuse them.

Since recovery of a judgment does not divest the seller of his lien it conversely follows that he need not deliver possession to the buyer, nor even tender it, in order to bring his suit for the price, although he must be able and willing to do so. And this is, of course, consequent on the assumption that title may pass without change of possession, and that title, not possession, is the *quid pro quo* for the buyer's grant of the price.⁸⁶

The lien is not lost by mere failure to set it up as a reason for not delivering possession. "An examination of the authorities on the subject, from the early case of *Boardman v. Sill*, 1 Camp. 410, down, satisfies us that they all proceed upon principles essentially of equitable estoppel, and limit the application of the doctrine invoked by counsel to cases where the refusal to deliver the property was put on grounds inconsistent with the existence of a lien, or on grounds entirely independent of it, without mentioning a lien. Thus it has been repeatedly held that a lien is not waived by mere omission to assert it as the ground of refusal, or by a general refusal to surrender the goods, without specifying the grounds of it, except in certain cases, where the lien was unknown to the person making the demand, and that fact was known to the person on whom the demand was made. In such

85—See *ante*, p. 103.

86—"But it would seem they, (the sellers), could not have an action against Wade for the price, even after the term of credit had expired, according to the rule in *Noy's Maxims*, until they had delivered the mule to Wade, or tendered him; and the case of *Potter v. Cowand*, Meigs, 26, above referred to, proceeds on this ground. The other cases do not, and we

think as the sale was perfect between the Moffetts and Wade, the Moffetts could sue for the price after the credit expired, without a delivery or offer to deliver, because the law giving them a lien on the mule, it would be unreasonable to require them to relinquish it before they were paid the price agreed." *Wade v. Moffett*, 21 Ill. 110.

cases, if the ground of the refusal is one that can be removed, the other party ought in fairness to have an opportunity to do so. But no such state of facts exists in this case. While the defendant did not specify his vendor's lien by reason of plaintiff's insolvency, as the ground of his refusal, yet he never placed his refusal on any ground inconsistent with or independent of it."⁸⁷

Enforcement of Lien.—Resale.—A lien in its origin, as the derivation of the term from the root word meaning a "tie" or "bond" indicates, gave no right to sell the goods subject to it. It was a right of possession merely. "The very notion of a lien is, that if the person who is entitled to the lien, for his own benefit parts with the chattel over which he claims to exercise it, he is guilty of a tortious act. He must not dispose of the chattel so as to give some one else a right of possession as against himself. The lien is the right of the creditor to retain the goods until the debt is paid."⁸⁸ If a "seller's lien" were in fact a lien only, the only benefit it could be to him would be whatever he might find in the power of retaining possession of goods actually owned by another person—a dubious benefit in some circumstances.

But the right of an unpaid seller who is still in possession, while it is almost invariably called a lien, is in fact much more than a mere right of continued possession. He has a thoroughly recognized right to resell the property in case of an essential breach of the contract by the buyer. This right to resell was recognized as early as 1704 in *Langfort v. Admx. of Tiler*,⁸⁹ when the court said, "After earnest given, the vendor cannot sell the goods to an-

87—*Crummey v. Raudenbush*, 55 Minn. 426; *Everett v. Coffin*, 6 Wend. (N. Y.) 603; *Fowler v. Parsons*, 143 Mass. 401; *White v. Gainer*, 2 Bing. 23; *contra*, *Hanna v. Phelps*, 7 Ind. 21; *Hudson v. Swan*, 83 N. Y. 552, a claim of title is inconsistent with that of a lien

and one who has claimed title thereby loses his lien; *Boardman v. Sill*, 1 Camp. 410, claim of title is inconsistent with that of a lien; *cf. Lord v. Jones*, 24 Me. 439.

88—*Mulliner v. Florence*, 3 Q. B. Div. 484.

89—1 Salkeld 113.

other, without default in the vendee; and therefore if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person."

This statement of the court indicates that the resale, if made, is indication of a dissolution of the contract, and many other courts have spoken of the right of resale as founded on a "rescission" of the contract. The actual decisions, however, do not bear out the idea. For the seller to dissolve, or rescind, the contract, in a proper sense of those terms, would put an end to its existence. He could not be sued, thereafter, but neither, the agreement having been rescinded, could he sue the buyer in *assumpsit*. Yet the decisions invariably recognize the right of a seller to sue the buyer on the contract despite his having enforced the lien by a resale of the goods. The theory on which resale is based, therefore, cannot really be that of a rescission of the contract and a revesting of title in the seller, who may thereupon resell his own property. It is rather, that the seller resells property of the buyer, which his lien gives him legal authority and power to do. "His right is very nearly that of a pledgee, with power to sell at private sale in case of default."⁹⁰ In *Sands v. Taylor*,⁹¹ the seller resold wheat, title to which had passed to the buyer, but which the buyer refused to take and pay for. He then sued the buyer for breach of the contract. The court allowed the suit on the theory that the resale was not a dissolution of the contract but was made by the seller as a "trustee, or agent" for the buyer. The possession of the seller was, it must be noted, predicated in this case on abandonment by the buyer rather than on a lien.⁹²

90—*Tuthill v. Skidmore*, 124 N. Y. 148.

91—5 Johns. (N. Y.) 395.

92—See discussion of this case in *Moore v. Potter*, 155 N. Y. 481.

In *Conrad v. Fisher*,⁹³ the court said specifically, "We understand it to be the settled law that the right to enforce a vendor's lien, in respect of goods sold upon credit (*sic*), is not a right to rescind the contract of sale, but is a right to detain the goods until the indebtedness for the purchase price is discharged, at or before the expiration of the credit, and, if not so discharged to sell them and apply the proceeds of their sale to the liquidation of the indebtedness."^{94*}

—**What Constitutes Default.**—The fact that the seller may exercise a right of resale, by virtue of his lien, in case of essential default by the buyer, raises the question, what constitutes such a default.

A repudiation of the agreement by the buyer is obviously a material breach. Thus a refusal by the buyer to receive the goods if tendered is a clear breach of contract and, seemingly without demur, is held to give the seller a right to resell and sue for the difference. Of course these cases do not often involve any question of seller's lien by name, since they arise out of an attempt by the seller to deliver possession, but they furnish a positive analogy as to what would constitute such a breach as to allow resale under the lien.

The case of *Langfort v. Admx. of Tiler*,⁹⁵ already referred to, intimates that mere failure of the buyer to pay at the time set is not such a breach as will permit a re-

93—37 Mo. Ap. 352, 362.

94—*Diem v. Koblitz*, 49 O. S. 41; *Maclean v. Dunn*, 4 Bing. 722, "It has never been decided that a resale of the goods is a bar to an action for damages for non-performance of a contract to purchase them * * * it is most convenient that when a party refuses to take goods he has purchased, they should be resold, and that he should be liable to the loss, if any,

upon the resale." It was assumed in this case that title had passed to the buyer. *Van Brocklin v. Smeallie*, 140 N. Y. 70, the right of resale is not limited to tangible property, nor to perishable property, but applies to *choses in action* and any type of merchandise. *Ames v. Moir*, 130 Ill. 582; *Arnold v. Carpenter*, 16 R. I. 560.

95—1 Salkeld 113.

*See Uniform Sales Act, Section 61, (1).

sale, but that thereafter "the vendor ought to go and request him; and then if he does not come and pay, and take away the goods in convenient time, * * * he (vendor) is at liberty to sell them to any other person." This idea that mere failure to pay is not an essential breach is sustained by *Martindale v. Smith*,⁹⁶ in which, although the argument was as to the right to "rescind" the contract and revest title because of default in payment, the court said, "In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement." The mere stipulation that payment was to be made "in twelve weeks from the date" of the contract was held not expressly to make that time of the essence.⁹⁷ In *Fancher v. Goodman*,⁹⁸ it was held that a seller had no right to resell by virtue of his lien merely because the buyer did not pay at the time set, but that he might properly have resold if he had first given notice to the buyer that he would resell if payment were not forthcoming.⁹⁹

The failure of a buyer to keep his credit good revives the seller's lien and justifies him in refusing to deliver possession. But such failure is not a breach of the contract to buy. The fact that the buyer becomes bankrupt does not absolve the seller from his obligation to deliver the property, if the bankrupt or his assignee is in fact ready to perform at the time such performance is due. Non-payment by the buyer may, as indicated below, justify the seller in reselling, but mere bankruptcy before the time of payment does not conclusively indicate that the

96—1 Q. B. 389.

97—This case very strongly implies that the seller has no right of resale at all, unless he shall have truly rescinded the contract. It may possibly stand for the proposition that non-payment does not permit of a rescission, and that resale by virtue of a lien is never allowed.

98—29 Barb. (N. Y.) 315.

99—*Raymond v. Bearnard*, 12 Johns. (N. Y.) 274; *Porter v. Wormser*, 94 N. Y. 431, there is no right of resale while credit given still exists; *Greaves v. Ashlin*, 3 Camp. 426, mere failure of buyer to take away goods within a reasonable time held not to justify a resale.

buyer will not be able to pay when the time comes.¹⁰⁰ The buyer, however, cannot practically object to a resale by the seller, even though the seller has thereby rendered himself unable to perform, until he, the buyer, is himself ready to perform. The unauthorized resale is not in itself a breach. The breach would be the seller's unjustified refusal to deliver at the proper time and to predicate such breach the buyer would have to show that he was himself ready to perform.¹⁰¹

But, failure of a buyer to pay when agreed is quite another matter, and, as is intimated in the cases just referred to, if, after the buyer's failure to pay at the time stipulated, the seller specifically notifies him that payment is due, and the buyer thereafter refuses to pay, or so neglects it as to imply a refusal, there is a sufficient breach to justify the seller in reselling.^{102*}

If there has been no such breach by the buyer as would justify a resale by the seller, the buyer upon tender of payment is, of course, entitled to possession of the goods. If the seller, by an unjustified resale, has put it out of his power to perform, the buyer may have an action against him, upon tender of his own performance at the proper time.¹⁰³

—Application of Proceeds of Resale.—Assuming, merely, that the seller, by virtue of his lien, has not a

100—Kearney v. Union Pac. R. R. Co., 97 Iowa 719, 59 Am. St. 434; Gibson v. Carruthers, 8 M. & W. 321.

101—Diem v. Koblitz, 49 O. S. 41; Rappleye v. Racine Seeder Co., 79 Ia. 220; Brassel v. Troxel, 68 Ill. Ap. 131; Pardee v. Kanaday, 100 N. Y. 121; Ex parte Chalmers, L. R. 8 Ch. Ap. 289.

102—Van Brocklen v. Smeallie, 140 N. Y. 70; Olcese v. Mobile Fruit Co., 112 Ill. Ap. 281; Nelson v. Hirsch & Sons Co., 102 Mo. Ap.

498; Hayes v. Nashville, 80 Fed. 641; Maclean v. Dunn, 4 Bing. 722; Ogg v. Shuter, L. R. 10 C. P. 159; 1 C. P. Div. 47.

103—A buyer who has tendered the amount due the seller under the latter's lien may bring an action for conversion against the seller, Wright v. Andrews Co., 212 Mass. 186, 98 N. E. 798; Pardee v. Kanady, 100 N. Y. 121; Martindale v. Smith, 1 Q. B. 389; compare Gibson v. Carruthers, 8 M. & W. 321.

*See Uniform Sales Act, Section 60, (1), (2).

right of rescission, but only a right to resell in satisfaction of the indebtedness, a question is raised as to the party entitled to the surplus in the unusual event that the resale should bring more than the amount of the indebtedness. Logically the buyer would be entitled to the excess. But *if* the seller who remains unpaid after title has passed has a right to revest title in himself, by so acting he would become again the owner of the goods, and would be entitled to all they might bring upon a resale, just as though title had never passed to the buyer. In the event that a resale should bring more than the purchase price, it would probably be presumed, although no case involving the precise question has come to the writer's knowledge, that the seller had chosen to revest the title in himself, rather than to resell in mere enforcement of his lien. The real question, therefore, is whether a seller who has passed title but retained possession *can* revest title in himself upon the buyer's default in payment.¹⁰⁴ The right to rescind contracts, other than those of sale, because of essential default on the part of the promisor is discussed in works on contract and does furnish an analogy for the proposition that the seller in possession may, if he choose, rescind and dissolve the contract in such a way as to revest himself with title, instead of proceeding by way of enforcing his lien.*

—**Failure to Resell.**—The same question arises in another form also. If there has in fact been such a breach by the buyer as would justify a resale by the seller, in enforcement of his lien, does the buyer continue to be owner until such resale? In other words, is it absolutely necessary for the seller to resell in order to divest the buyer of title? While no court appears to have decided

104—There are cases in which these the title was in the seller resale has brought more than the on a different theory than rescission. original purchase price, but in

*See Uniform Sales Act, Section 61, (1).

the matter exactly, there are statements which intimate that the seller could revest title in himself on the buyer's default and need not resell the goods.

Assuming in answer to these questions that the seller does have power to revest the title in himself, there arises the further question whether it is necessary for him to *rescind* the contract, in the precise sense of putting an end to it, to do this. We have seen that when title has *not* passed, the seller may keep the goods, which are already his own, and sue for damages, which are generally the difference between the market value and the agreed price. We have seen also that the seller who has passed title can *resell* the goods, in a certain sense as the buyer's property, and sue for the difference. But can the seller who has passed title also *keep* the goods as his own and still sue for the difference between their market value and the agreed price? If, to revest title in himself, he has to abrogate the contract, there is then no contract existing on which to base his action for this difference.

This matter is much confused with the right of a seller who has *not* passed title to keep the goods as his own and sue for the difference between market value at time of breach and the agreed price. But in these cases the seller has continued in possession of the title all the time; there is no question of retaking it from the buyer. Nevertheless the authorities on this point, particularly *Dustan v. McAndrew*,¹⁰⁵ are occasionally made the basis of statements, by both judges and text-writers, to the effect that a seller who has passed title can retake it without actually rescinding the contract. Thus, in *Van Brocklin v. Smealie*,¹⁰⁶ it is very clearly said, though as a matter of *dictum* only, that even where title has passed the seller still in possession may keep the goods as his own and sue for damages. But there are not enough cases in which the

105—44 N. Y. 72.

106—140 N. Y. 70.

matter has been clearly passed on for any real conclusion to be drawn.*

—**Notice of Resale.**—The method of reselling, the giving of notice and the like, are governed by the same rules as apply to resale in order to fix damages in case of the buyer's refusal to accept title. These rules have already been discussed.¹⁰⁷ In that discussion it was pointed out that one reason why the seller need not give notice of the resale was because he was reselling his own property for the purpose of getting evidence as to its market value, and lack of notice, therefore, could not affect the validity of the sale, but only the value of the evidence. In case of resale by a seller by virtue of his lien, he is selling property of another person. It might be supposed therefore that he would be required to give notice at least. In *VanBrocklin v. Smeallie*,¹⁰⁸ however, the court said,—as a matter of *dictum* since notice had in fact been given—that, even though title had passed to the buyer, the resale “need not be at auction, unless such is the customary method of selling the sort of property in question, nor is it absolutely essential that notice of the time and place of sale should be given to the vendee.” In *Pollen v. LeRoy*,¹⁰⁹ the sale was of specific property, and the court appears to have considered that title had passed, although its real opinion upon this point is not clear. Nevertheless, it held expressly that notice of the time and place of resale need not be given the buyer, saying, “The law regards him (the seller), it has been said in some of the cases, if in possession of the goods, as the agent *quoad hoc* of the vendee. But it is no part of such an agency, or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold, or exposed for sale. Indeed, in a majority of cases such a notice would be entirely impracticable, as it

107—*Ante*, p. 90.

109—30 N. Y. 549.

108—140 N. Y. 70.

*See Uniform Sales Act, Section 61, (1).

would have been in this. Unless the sale is to be public and at auction, no notice of the time and place can be given. * * * There is no analogy in this particular between this case and that of a pledge. The pledgee is not the owner nor the agent of the owner. He is clothed with the possession and with a right to sell the property, in order to repay himself a debt. Unless he resorts to judicial proceedings to extinguish the right of his debtor, he is bound to give notice to the latter * * *. A vendor, on the contrary, is simply an agent, if he elect to become such, of a vendee who refuses to complete his purchase; an agent to sell the property fairly and to the best advantage. The only requisite to such a sale as a measure of the rights and the injury of the party, is good faith, including the proper observance of the usages of the particular trade.”¹¹⁰

In these cases there had been notice to the buyer of the seller's intention to resell, though the time, place or manner of the resale were not indicated. It is probable that this *notice of intention to resell* would be requisite to a resale by virtue of the lien,¹¹¹ although it is not usually required in cases of resale merely to fix damages when title has not passed.^{112*} If notice were not given, it might be a fair assumption that the seller had elected to rescind the contract and take back title to himself, if, as we have assumed above, courts permit revesting of title to be done. That is, failure to notify the buyer of the resale would indicate that the seller had chosen to resell the goods *as his own*.

Stoppage in Transitu.—We have seen that a seller by delivering possession to the buyer loses his right of lien.

110—Waples & Co. v. Overaker & Co., 77 Tex. 7; aced. Ridgley v. Mooney, 16 Ind. Ap. 362.

111—Hayes v. Nashville, 80 Fed. 641; Davis Sulphur Ore Co. v. Atlanta Co., 109 Ga. 607; Ridgley v.

Mooney, 16 Ind. Ap. 362; Dill v. Mumford, 19 Ind. Ap. 609; Newberger v. Rountree, 18 Ill. Ap. 610; Winslow v. Harriman Iron Co., — Tenn. —, 42 S. W. 698.

112—*Ante*, p. 90.

*See Uniform Sales Act, Section 60, (1), (3), (4), (5), 61, (2).

There is, however, one real or apparent exception to this. If the goods have merely been given to a carrier for transportation to the buyer and are still in transit, the seller is allowed to retake possession *if it develops that the buyer is apparently insolvent*. This right is called "*stoppage in transitu*." Like the "seller's lien" the term presupposes that title has passed to the buyer.¹¹³ A seller who has not yet passed title may retake possession from a carrier because he is owner, just as an owner may keep possession if he chooses. But it is only when the right of repossession is exercised by a seller who has parted with title that the name "*stoppage in transitu*" is properly applied.^{114*}

—**Origin.**—This right to retake possession appears to have originated in equity, on the principle that if a seller could prevent the goods from actually coming into the hands of a bankrupt he *ought* to be allowed to do so. It was soon developed also as a principle of law.¹¹⁵

113—Reynolds v. Rr., 43 N. H. 580; Dickman v. Williams, 50 Miss. 500; Rowley v. Bigelow, 12 Pick. (Mass.) 307; Bolton V. Lancashire, etc. Co., L. R. 1 C. P. 430, 439.

114—Courts occasionally neglect the true meaning of the phrase and use it in connection with retaking by an owner. Swanwick v. Sothern, 9 Ad. & El. 895; Cf. Pattison v. Culton, 33 Ind. 240. The distinction is acted on in Kearney v. Union Pac. Rr. Co., 97 Iowa 719, 59 Am. St. 434.

115—Wiseman v. Vandeputt, 2 Vernon 203; Burghall v. Howard, 1 H. Blackstone 365 N; D'Aquila v. Lambert, 1 Ambler 399, 2 Eden 77; Gibson v. Carruthers, 8 M. & W. 321, "Although the question of stoppage *in transitu* has been as

frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner. In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity, which the common law has adopted." This opinion cites authority bearing upon the conflicting theories of origin and points out, also, the existence of the right in other systems of law.

That the right of stoppage originated neither in law nor in equity, but was adopted from the Law

*See Uniform Sales Act, Section 57.

—**When Right Arises.**—The right of stoppage arises only when the buyer is discovered, after the shipment of the goods, to be insolvent. Since the title to the goods is in the buyer, the seller has no right to them, after he has parted with possession, save by virtue of this particular remedy. This right arose, as the expression of the early cases indicates, out of desire to protect the seller against obvious and inevitable loss, rather than from any logically derived rule of law. "It was determined, on solid reasons, that the goods of one man should not be applied in payment of another man's debts." It extends, therefore, only to cases where the buyer is discovered, subsequent to the sale, to be insolvent. The date on which the buyer became insolvent is immaterial; it is the date on which the seller becomes aware of it that matters. The right of stoppage is not derogated by the fact that the buyer was already insolvent at the time of shipment, or even at the time the contract of sale was entered into. "If there be a want of ability to pay, it can make no difference, in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the sale."¹¹⁶

If the seller knew, actually or constructively, of the buyer's insolvency at the time of shipment, or, *a fortiori*, at the time of making the contract, there would be no reason for allowing him to stop *in transitu*. The fact that he shipped the goods, knowing the buyer to be insolvent, would clearly imply an intent to give the buyer possession

Merchant is stated in *Kendall v. Marshall*, 11 Q. B. D. 356.

It is obvious from the language of the early cases that some idea of title not having passed at all entered into the decision and the seller was thought of as retaking possession of his own goods, rather than retaking title, or reasserting a mere lien. But the later cases clearly recognize the

right as existing when title is in the buyer.

116—*Loeh & Bro. v. Peters*, 63 Ala. 243, 248; *Lancaster Co. Bk. v. Huver*, 114 Pa. 216; *Reynolds v. Rr.*, 43 N. H. 580, overruling *Rogers v. Thomas*, 20 Conn. 53; *Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *O'Brien v. Norris*, 16 Md. 122; *Blum & Co. v. Marks*, 21 La. An. 268; *More v. Lott*, 13 Nev. 376.

despite that fact, and the reason for the exception to the rule that a seller can not retake possession after title has passed, would be gone. The courts so hold.¹¹⁷

As will be seen later,¹¹⁸ the exercise of the right to stop is not a rescission of the contract but a mere withholding of actual possession of the goods. As no more effect than a delay in possession would result, the courts have been unanimous in holding that actual insolvency of the buyer is not necessary to justify the stoppage. Such an appearance of insolvency as would lead a reasonable man to suppose insolvency existed is all that is necessary. The courts appear to make a distinction, although there is no statement to such effect, between the evidence of insolvency which will support a seller's right to *keep* possession, (as against an attaching creditor of the buyer, for instance,) and that which will protect him against a suit in damages for delay caused by his stoppage. For the one, actual insolvency is necessary, for the other only appearance of insolvency. This may explain some of the dissimilarity in holdings upon rather similar facts.¹¹⁹

But there must be a real appearance of insolvency at least and mere suspicion that the buyer is insolvent, or belief that, from other reasons than insolvency, he will not pay for the goods, will not justify a stoppage and a seller who has acted on any such reason is not entitled to possession and, moreover, will be liable in an action for damages by the buyer.¹²⁰

117—O'Brien v. Norris, 16 Md. 122; Buckley v. Furniss, 15 Wend. (N. Y.) 137; Blum & Co. v. Marks, 21 La. An. 268; Fenkhausen v. Fellows, 20 Nev. 312; Evans etc. Co. v. Missouri K. & T. Rr., 64 Mo. Ap. 305.

118—*Post*, p. 146.

119—O'Brien v. Norris, 16 Md. 122, "if a stoppage of payment by the vendee be proved, it is sufficient." Jeffris v. Fitchburg R. R.,

93 Wis. 250, failure to pay seller's claim and disappearance of buyer sufficient; More v. Lott, 13 Nev. 376.

120—Kavanaugh Mfg. Co. v. Rosen, 132 Mich. 44, 92 N. W. 788, mere belief founded on unsatisfactory rating by a credit agency not sufficient; Jewett Pub. Co. v. Butler, 159 Mass. 517, mere doubt not enough; Bayonne Knife Co. v. Umbenhauer, 107 Ala. 496; Smith

The right of stoppage is not affected by the fact that the seller has received notes or other instruments for the price, or in other ways given credit, unless such notes have been accepted in payment.^{121*} Neither is it affected by part payment, although, of course, the debt for which the property could be held would be proportionately reduced.¹²²

—Does Not Exist Against Buyer's Possession.—The right of stoppage *in transitu* is, as its name indicates, a right to retake possession only while the goods are in transit to the buyer. The exception on which the right is founded does not go to the extent of permitting repossession after the journey is ended. This point was raised in *Conyers v. Ennis*.¹²³ In that case it appeared that one Rousmaniere had ordered goods of the plaintiff which the latter duly shipped to him. He was insolvent at the time, although this was unknown to the plaintiff, and later committed suicide. The carrier delivered the goods into the hands of his administrators, the defendants. The defendants resold the goods and the plaintiffs now claimed the proceeds. As there appeared to be no actual fraud on Rousmaniere's part on which a rescission of the contract could be founded, the plaintiffs claimed a right of stoppage *in transitu*.

Mr. Justice Story began his opinion by recognizing that "this is a case of extreme hardship, and such as might well induce a court to strain after some mode of redress."

& Co. v. Barker, 102 Ala. 679, fact that buyer has absconded is not, by itself, enough; *Gustine v. Phillips*, 38 Mich. 674.

121—*Newhall v. Vargas*, 13 Me. 93; *Stubbs v. Lund*, 7 Mass. 453; *Brewer Lumber Co. v. Bost. & Al. Rr.*, 179 Mass. 228, even though on receipt of note bill is marked paid; *Clapp Bros. v. Sohmer*, 55 Iowa

273; *Hays v. Mouille & Co.*, 44 Pa. 48, notes need not be tendered back at time of stoppage; *Edwards v. Brewer*, 2 M. & W. 375; *Feise v. Wray*, 3 East 93.

122—*Newhall v. Vargas*, 13 Me. 93; *Howatt v. Davis*, 5 Mumford (Va.) 34; *Feise v. Wray*, 3 East 93.

123—2 Mason 236, Fed. Cas. 3149.

*See Uniform Sales Act, Section 52, (1), (2).

“The principal point,” he continued, “which under these circumstances has been pressed at the bar, is that the right of a consignor to stop property in cases of insolvency, ought not to be confined to cases of stoppage *in transitu*, but in equity should extend to all cases where the property is not paid for and remains in the hands of the consignee. It is admitted that the decisions in *England* have confined the right of stoppage to cases where the property is in its *transit*. But it is suggested, that the point has not been solemnly adjudged in the *United States*, and that it is open for the court to adopt the more enlarged rule, hinted at by Lord *Hardwicke*, in *Snee v. Prescott*.¹²⁴ * * * All argument of this sort is addressed in vain to this court. * * * Nothing is better settled, if an uninterrupted series of authorities can settle the law, than the doctrine that the vendor, in cases of insolvency, can stop the property only while it is in its transit. If it has once reached the consignee, there is an end of all right to reclaim it as a pledge for the payment of the purchase money.”¹²⁵

—**When Goods Are in Transit.**—The issue is very often raised, therefore, as to just when the transit between seller and buyer has ceased. In general it may be said that it is not at an end until the goods have come into the actual possession of the buyer or the possession of someone acting as the buyer’s agent *for the purpose of possession*.*

Very broadly speaking the goods are in transit, whether in motion or at rest, whether in the hands of the original carrier or of some remote forwarder, so long as

124—1 Atk. 245.

125—This is true even though the buyer personally is willing to give up the goods and admits that he received them without intending to keep them. *Smith v. Gail*,

44 Fla. 803, 33 So. 527. Even though the carrier later takes possession from the buyer and goods are in its hands at time of seller’s attempt to stop. *Re Dancy Hardware Co.*, 198 Fed. 336.

*See Uniform Sales Act, Section 58, (1), (2), (3), (4).

the bailee in whose possession they are has them by virtue of the seller's contract with the transportation agency. The transit does not end until the person in whose possession they are, holds, by virtue of some new agreement, under some contract relation with the buyer, or his privy.¹²⁶

Mere length of time elapsed between the shipment and the attempt to stop *in transitu* does not itself terminate the transit, nor otherwise affect the right.¹²⁷

The carrier, as such, is an agent for carriage and not primarily for possession and the transit is not at an end so long as the goods are in its possession as carrier. Even though they have come to their journey's end so far as the carrier's duty to transport is concerned, if the freight is still unpaid, or the carrier has another lien against them, and the carrier has not agreed with the buyer to hold under a new contract with him, they are still technically in transit.¹²⁸ But the idea of transportation—not necessarily meaning motion—is essential; if it is lacking, the agent is obviously an agent primarily for possession.¹²⁹

The character of the carrier is immaterial. So long as it is acting as an agent for the purpose of *transportation* only and is not an agent of the buyer for purpose of possession, as such, the right of stoppage may be exercised.¹³⁰

126—It has been said that even actual physical possession by the buyer would not terminate the transit if without consent on his part. *Heinekey v. Earle*, 8 El. & Bl. 410, 120 Eng. Rep. 153.

127—*Buckley v. Furniss*, 15 Wend. (N. Y.) 137, 40 days; *Jeffris v. Fitchburg Rr.*, 93 Wis. 250, more than a year.

128—*Jeffris v. Fitchburg R. R.*, 93 Wis. 250; *Brewer Lumber Co. v. Bost. & Al. R. R.*, 179 Mass. 228; *Wheeling & L. E. R. R. Co. v. Koontz*, 61 O. S. 551; *Rogers v.*

Schneider, 13 Ind. Ap. 23; *Harding Paper Co. v. Allen*, 65 Wis. 576; *Kahnweiler v. Buck*, 2 Pears. (Pa.) 69, even though carrier has made tender of possession to the buyer; *Coleman v. N. Y., N. H. & H.*, 215 Mass. 45, even though buyer has paid freight and taken samples.

129—*Rummel v. Blanchard*, 216 N Y. 348.

130—*Johnson v. Eveleth*, 93 Me. 306, logging company as carrier; *Muskegon v. Underhill*. 43 Mich. 629, implied.

Even if the means of transportation is owned or chartered by the buyer, if it is used *as a carrier* for the purpose of transporting the goods to the buyer, the goods are in transit until they reach him, and are subject to stoppage.¹³¹

If, however, they are delivered to a vessel or other carrier as though to a warehouse, or to an *agent for possession*, then the transit between the seller and the buyer is at an end, despite the fact that the goods are to be carried to other points. The matter is well stated in *Berndtson v. Strang*,¹³² the court saying, "If a man send his own ship, and orders the goods to be delivered on board his own ship, and the contract is to deliver them free on board, then the ship is the place of delivery and the *transitus* is at an end, just as much * * * as if the purchaser had sent his own cart, as distinguished from having the goods put into the cart of a carrier. Of course there is no further *transitus* after the goods are in the purchaser's own cart. There they are at home, in the hands of the purchaser, and there is an end of the whole delivery. The next thing to be looked to is, whether there is any intermediate person interposed between the vendor and the purchaser. Cases no doubt may arise, where the *transitus* may be at an end although some person may intervene between the period of actual delivery of the goods and the purchaser's acquisition of them. The purchaser, for instance, may require the goods to be placed on board a ship chartered by himself and about to sail on a roving voyage. In that case, when the goods are on board the ship everything is done; for the goods have been put in the place indicated by the purchaser and there is an end of the *transitus*."

The question of whether the delivery to the carrier is for transportation between the seller and buyer, or is a delivery to a representative of the buyer for transporta-

131—*Newhall v. Vargas*, 13 Me. 93; *Stubbs v. Lund*, 9 Mass. 453; *parte Falke*, 14 Ch. Div. 446, 7 App. Cas. 573.
132—*L. R.* 4 Eq. 481.
Ilsey v. Stubbs, 9 Mass. 65; Ex

tion elsewhere, is really one of fact in each case and not one that can be solved by the application of any rule.¹³³

The truest test, although one not expressed by courts is, that if the possessor of the goods holds them through *contract* with the seller, the goods are in transit, while if contract relation with the seller has terminated, or the possession has been delivered without contract relation, the transit is ended.¹³⁴

The coming of the goods into other hands than those of the original carrier does not necessarily terminate the transit, if the original contract still exists.

The delivery by the carrier to a wharfinger or warehouseman does not terminate the transit, if such recipient is the carrier's agent, or a public agent, to hold the goods until actual or constructive delivery, to the buyer. Such a warehouseman is merely a link in the chain of transportation under the seller's original directions.¹³⁵

133—Bethell & Co. v. Clark, 20 Q. B. Div. 615.

134—Newhall v. Vargas, 13 Me. 93; Stubbs v. Lund, 9 Mass. 453; Berrendson v. Strang, L. R. 4 Eq. 481; Cf. Schotsmans v. Lancashire & Y. R. R., L. R. 2 Ch. Ap. 336. In Bethell & Co. v. Clark, 20 Q. B. Div. 615, the contract of sale was silent as to delivery but the buyer's subsequent order was to "con-sign * * * to the 'Darling Downs', to Melbourne * * *". The issue was whether transit ended with delivery on board the Darling Downs. The court held that it did not so end, that where the transit "has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists" and that the "business meaning" of the order in this case was, not that the goods were

to be delivered to the Darling Downs as to a *warehouse*, thence to be sent further by the buyer, but to her as a *carrier* which would transport them to Melbourne. The Darling Downs appears to have been a general ship, scheduled to sail to Melbourne independently of the buyer. In Rowley v. Bigelow, 12 Pick. (Mass.) 307, the goods were ordered delivered to the ship "Lion", which the buyer owned himself, and which he had himself apparently ordered to proceed to Boston. It was held that the transit ended on delivery aboard the Lion.

135—Reynolds v. R. R., 43 N. H. 580; Calahan v. Babcock, 21 O. S. 280; Mottram v. Heyer, 5 Denio (N. Y.) 629, delivery to customs officers; Donath v. Broomhead, 7 Pa. 301, *idem*.

Neither is the original transit terminated by delivery from one carrier to another so long as both are actors in the originally contemplated journey.¹³⁶ But the transit is ended when the original carrier delivers them, even to another carrier, if the delivery is at the buyer's order and was not a part of the transit originally contemplated as necessary to get them to the buyer. The second carrier then holds them as the buyer's representative in possession. Thus, in *In re Patterson Co.*,¹³⁷ C ordered goods of B, who in turn ordered them of A. A thereupon shipped them to B, at St. Louis. On their arrival there B reconsigned them to C, in Arkansas. The court held the transit to have ended with B's reconsignment, as the original journey *to the buyer* was ended in St. Louis, even though the sellers knew they were ultimately to go further on, and had tagged the goods with C's name and address.¹³⁸

A fortiori, the transit is not ended through mere delivery of the goods to a warehouseman whose duty is to send the goods still further on their journey. And this is so even though the orders as to the rest of the journey are to come from the buyer himself. Although it does not expressly appear in the cases, a distinction would undoubtedly be made if the parties had not clearly contemplated the place of the further journey at the time of shipment. That is to say, the holdings that a warehouseman in whose care goods have been consigned is not a possessory agent of the buyer seem to be founded

136—*White v. Mitchell*, 38 Mich. 390, delivery by carrier to a carter; *Re Burke & Co.*, 140 Fed. 971, *idem*; *Bethell v. Clark*, 20 Q. B. Div. 615.

137—186 Fed. 629.

138—*Cf. Muskegon Booming Co. v. Underhill*, 43 Mich. 629; *Brooke Iron Co. v. O'Brien*, 135 Mass. 444; *Norfolk Co. v. N. Y., N. H. & H. R.*, 202 Mass. 160.

But in *Bravan v. Atlanta*, etc.

R. R. Co., 108 Ga. 70, 79 Am. St. 26, a sub-buyer laid his hands on the goods while in the freight house at their original destination and ordered them sent to his own buyer; yet the original seller was allowed to retake possession. In *Lewis v. Sharvey*, 58 Minn. 464, a mere order from the buyer to the carrier to deliver to another person in the same place was held not to terminate the transit.

on the fact that at the time of consignment it was contemplated that they had still to go to some definite place before reaching the buyer, although the buyer was to direct their getting there. Thus, where goods were consigned to the buyer at Malone, in care of a warehouseman at Plattsburg, it was obvious that a journey beyond Plattsburg was contemplated, even though the means of getting them from Plattsburg to Malone was left to the buyer's arrangement. In that case it was held that the goods had not come to the end of their transit in the warehouseman's hands.¹³⁹

Delivery by the carrier, even to a recipient who has nothing to do with the transportation, does not end the transit *if the recipient does not in any way represent the buyer*, as agent or otherwise.¹⁴⁰ But the right is lost if the recipient represents the buyer, as, for instance, the administrator of a deceased buyer's estate.¹⁴¹

To recapitulate, the fact that the goods are or are not in motion seems to have no effect in determining whether or not they are in transit. Neither does the character of the person in possession—i. e., his character as a transporter, a forwarder, or a warehouseman—have any

139—Buckley v. Furniss, 15 Wend. (N. Y.) 137; Blackman v. Pierce, 23 Cal. 508; Hepp v. Glover, 15 La. 461; Hause v. Judson, 4 Dana (Ky.) 7; Chandler v. Fulton, 10 Tex. 2, buyer's instructions to intermediary to "hold onto the goods until he should order them away" held not to end transit. Frame v. Oregon Liquor Co., 48 Ore. 272, goods in hands of a teamster ordered by buyer to get them from the freight depot to which they had been consigned held still in transit. This case goes further than others. Hays v. Mouille & Co., 14 Pa. 48; Cablen v. Campbell, 30 Pa. 255, distinction between new destination and

method of getting to original one; Bethell v. Clark, 20 Q. B. Div. 615.

140—Kingman & Co. v. Denison, 84 Mich. 608, 11 L. R. A. 347, delivery to mortgagees of the buyer who had taken possession of his store.

But an assignee or trustee in bankruptcy does represent the buyer, Re Arctic Stores, 258 Fed. 688; McElroy v. Seery, 61 Md. 389; Cf., however, Tufts v. Sylvester, 79 Me. 213, holding a "bankruptcy messenger" not to represent the buyer.

141—Jacobs v. Bentley, 86 Ark. 186; Conyers v. Ennis, 2 Mason 236.

apparent effect on the decision. The one really indicative circumstance that can be deduced from the cases is the contract relation through which the holder of the goods is in possession. If his possession is one of contract, directly or indirectly, with the seller it indicates that he holds as a link in the transit. If his possession is under a contract with the buyer, it strongly indicates that the buyer has received possession—through his agent—and the transit is at an end.

If the goods are not consigned to the buyer at all, but to a buyer from him, to whom he has ordered them shipped, they would nevertheless seem technically to be in transit, so far as the right of stoppage is concerned, until they reach the possession of the person to whom they are consigned. This case occurs when the buyer gives instructions for the seller to make delivery to some third person instead of to the buyer himself. In such case the third person would seem to stand in place of the buyer, and the goods to be in transit until they have come into the possession of such representative of the buyer. Thus, if the original buyer has resold and thereafter directs the seller to ship to his buyer, the transit is between the original seller and the second buyer; but until the goods have reached the sub-buyer it can not be said that they have come into the hands of either the buyer or of any possessory agent of his. They are, therefore, logically still in transit.¹⁴² The decided cases, however, are against this position, and hold that the right of stoppage does not exist after shipment to the sub-buyer.¹⁴³

142—Compare *Ex parte Golding*, 13 Ch. Div. 628.

143—There are two ways in which the case might arise:—the buyer might order the goods sent to some agent or representative of his, instead of to himself; or the buyer, having resold the goods, might order them sent

directly to the sub-buyer. In the former case, there is no doubt, from the authorities already cited, but that the goods would be subject to stoppage any time before they reached the consignee named. Such a transit is truly one between the seller and buyer as represented by his agent. But in

—**Termination of Transit of Part of the Goods.**—Delivery to the buyer, or his possessory agent, of a *part* of the goods does not necessarily put an end to the transit of the rest of a single shipment. If, however, the delivery of the part is of symbolic import from which can be implied a new contract under which the carrier holds the rest no longer as carrier for the seller, but as possessory agent—even though still a carrier—of the buyer, then the transit is at an end because the goods are in the actual possession of the buyer through the possession of his agent for that purpose.¹⁴⁴

—**Transit as Affected by Acts of Outsiders.**—The fact that the goods have been taken from the actual possession of the carrier, by some one other than the buyer or his agent, does not terminate the transit. The most usual case of this is the attachment by creditors of the buyer of goods still in the carrier's hands, and the consequent taking possession of them by the sheriff or other legal officer. It is uniformly held that such attachment and change of possession does not defeat the seller's right to retake in case of the buyer's insolvency. It makes

the second case there is doubt. The spirit of the rule certainly justifies stoppage in such a case. The goods are just as logically in transit from seller to buyer when the consignee is one to whom the buyer has sold them as when the consignee is one whom the buyer has authorized otherwise to represent him. There is no question involved of the equity of such sub-buyer, because the courts have consistently held that one who buys from a buyer not in possession even of a bill of lading gets no equity that will defeat the original seller's right to stop in transit. The question is, therefore, solely one of the transit. Logically, since the goods sent by the

seller have not reached the possession of *anyone*, other than the carrier, they must still be in transit to the buyer or his representative. The authority is scanty, but what exists holds that the right to stop does not exist in such cases. The theory of the decisions is not clear. *Neimeyer v. Burlington, etc. R. R.*, 54 Neb. 321; *Shepard v. Burroughs*, 62 N. J. L. 469; *Eaton v. Cook*, 32 Vt. 58; *Memphis etc. R. R. Co. v. Freed*, 38 Ark. 614; *Treadwell v. Aydlett*, 9 Heisk. (Tenn.) 388.

144—*Buckley v. Furniss*, 15 Wend. (N. Y.) 137; *Tanner v. Scovell*, 14 M. & W. 28; *Ex parte Falk*, 14 Ch. Div. 446; 7 App. Ca. 573.

no difference at what time the debts of the attaching creditors accrued—unless they were misled by a bill of lading in the buyer's hands, a matter which is discussed hereafter.¹⁴⁵ If before the seller acts, the goods have been sold under the attachment proceedings, the right of the seller still attaches to the money in the hands of the court.¹⁴⁶

If the seller himself takes the goods on attachment against the buyer the result is not certain. It is said that by so doing he does not preclude a stoppage, since stoppage does not affect the buyer's *title* and is not inconsistent with attaching them as the buyer's goods.¹⁴⁷ The stoppage *in transitu* does, however, re-vest the seller with his lien, and it might well be said that attachment is inconsistent with a lien.¹⁴⁸

If, however, the goods should be taken from the carrier by the buyer himself, or his representative, the transit would have come to an end even though the destination originally intended had not been reached.¹⁴⁹

—**Carrier's Lien.**—The seller's right to possession is subordinate to the carrier's lien for freight on the particular shipment, although superior to a carrier's general lien for other freight.¹⁵⁰ In this connection, an unusual

145—*Post*, p. 221.

146—*O'Brien v. Norris*, 16 Md. 122; *Blum & Co. v. Marks*, 21 La. An. 268; *Bayonne Knife Co. v. Umbenhauer*, 107 Ala. 496; *Hepp v. Glover*, 15 La. 461; *Hause v. Judson*, 4 Dana (Ky.) 7, attaches to money made by sale; *Smith v. Goss*, 1 Camp. 282; *Calahan v. Babcock*, 21 O. S. 281; *Frame v. Oregon Liquor Co.*, 48 Ore. 272, unaffected by sale of goods under attachment proceedings; *Hays v. Mouille & Co.*, 14 Pa. 48; *White v. Mitchell*, 38 Mich. 390.

But cf. *Couture v. McKay*, 6 Manitoba L. R. 273.

147—*Allyn v. Willis*, 65 Tex. 65;

But compare *Fox v. Willis*, 60 Tex. 373; *Woodruff v. Noyes*, 15 Conn. 335.

148—See *ante*, p. 120.

149—*Hays v. Mouille & Co.*, 14 Pa. 48; *Walsh v. Blakely*, 6 Mont. 194; *Cabeen v. Campbell*, 30 Pa. 254; *Half v. Allyn*, 60 Tex. 278; *Mecham & Son v. N. E. R. R. Co.*, 48 Scot. L. R. 987, applying statute; *Whitehead v. Anderson*, 9 M. & W. 518.

150—*Rucker v. Donovan*, 13 Kan. 251; *Farrell v. Richmond*, etc. R. R., 102 N. C. 390, 3 L. R. A. 647, general lien; *U. S. Steel Co. v. Great Western Rr.*, L. R. 1 A. C. 189, general lien.

case was decided by the English court in *Booth Steamship Co. v. Cargo Fleet Co.*¹⁵¹ The action was by the carrier against the seller to recover freight charges. The seller had ordered the delivery withheld from the buyer, but showed no desire to get possession of the goods from the carrier. As the goods had been shipped in the name of the buyer and as his property, there was no contract for freight between the seller and the carrier. The buyer, however, was insolvent and, because of the stoppage, not entitled to possession, and the carrier's lien as against his goods for freight was practically worthless. The court treated the matter as "a novel and interesting point of law, of some interest to carriers and merchants," without analogous precedent, and by viewing the merits of the case declared the seller to be liable.

—**Exercise of Right.**—An attempted stoppage by the seller gives him no right against the goods if, despite his attempt, they have come into the buyer's possession, at least in the absence of actionable wrong-doing of the buyer. That is to say, so far as the right of repossession of the goods is concerned, stoppage *in transitu* means an actual retaking of the goods before they reach the buyer's possession, and not a mere attempt to retake possession.¹⁵²

In the event of unsuccessful attempt, the seller must look to the carrier for recompense for the latter's wrong-

151—115 L. T. R. 199.

152—See authorities in preceding notes. But in *Litt v. Cowley*, 7 Taunton 168, it was precisely held that the seller's attempt, by notification to the carrier, to stop the goods amounted to such a *rescission* of the contract as deprived the buyer, to whom actual delivery was made, of the right of possession. Apparently approved in

Mottram v. Heyer, 5 Denio (N. Y.) 629. *Northey v. Field*, 2 Esp. 613. This position would be sound if it were the rule that stoppage *in transitu*, or an attempt to stop, amounted to a rescission of the contract. The accepted rule, however, is that it does not revest title in the seller but merely re-establishes his lien.

ful action in delivering despite the seller's order to stop. But to fix any such liability on the carrier the seller must have given him notice not to deliver to the consignee. This proposition is so obvious and elementary that it seems to have given rise to no litigation.¹⁵³

The notice to the carrier need not be accompanied with a demand for possession; mere notice not to deliver to the consignee is sufficient to bind the carrier.¹⁵⁴ The seller may of course give notice through his own agent, as in other cases,¹⁵⁵ and "if the carrier is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*, the notice is sufficient",¹⁵⁶

The notice must be brought home to the principal person in possession of the goods, but the customary rules of agency apply here and fix the relations of the various persons connected with the carriage and notice to an agent is notice to the principal. So, "notice to the agent of the carrier, who in the regular course of his agency is in actual custody of the goods at the time the notice is given, is notice to the carrier."¹⁵⁷

There is surprisingly little authority in respect to the mode of giving notice and the persons to whom and through whom it must be given. Beyond the fact that notice must be given to the carrier, whether individual or association, in possession of the goods, in reasonable time for it to get instructions to its employees to with-

153—That the carrier is liable for delivery after notice to withhold it, see *Rosenthal v. Weir*, 170 N. Y. 148, and this liability is founded in tort, regardless of the contract for carriage. *Booth Steamship Co. v. Cargo Fleet Iron Co.*, 115 L. T. R. 199, 201; *The Tigress*, 8 L. T. R. 117; *Pontifex v. Midland Ry.*, 3 Q. B. Div. 23.

154—"A notice by the vendor, without an express demand to redeliver the goods, is sufficient to

charge the carrier." *Jones v. Earl*, 37 Cal. 630; *Reynolds v. R. R.*, 43 N. H. 580.

155—*Reynolds v. R. R.*, 43 N. H. 580; *Newhall v. Vargas*, 13 Me. 93, notice by unauthorized agent may be ratified; *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Whitehead v. Anderson*, 9 M. & W. 517.

156—*Jones v. Earl*, 37 Cal. 630.

157—*Jones v. Earl*, 37 Cal. 630.

hold delivery, nothing definite can be said. As to what employees can receive notice so as to bind the employer; when notice given to one carrier will bind another carrier cooperating in the transit; how far the carrier is obliged to notify another; what is reasonable time; and kindred matters, the accepted rules of agency are undoubtedly guiding analogies.^{158*}

Effect of Stoppage.—The effect of a stoppage *in transitu* was at one time in some doubt and some early decisions are in marked conflict with the later ones. There was among the former a tendency to treat a stoppage, even without actual retaking of possession, as a *rescission* of the contract, whereby the title was automatically revested in the seller.¹⁵⁹ The rule now accepted, however, is without question that neither an attempted nor accomplished stoppage is a rescission of the contract, but that the right to stop delivery and retake possession is a mere extension of the seller's lien, that is to say, of his right to retain possession till paid. The history of this rule is discussed in *Babcock v. Bonnell*,¹⁶⁰ and the conflict of authority pointed out. In conclusion that court says, "The question has never been, that I am aware, definitely decided in this State. As an original question the doctrine of rescission commends itself to my judgment as being more simple, and, in most cases, more just to both parties than the notion that the act of stoppage is the exercise of a right of lien, but in deference to the prevailing current of authority, I should hesitate in attempting to oppose it by any opinion of my own."^{161†}

¹⁵⁸—Time must be allowed for the notice to be passed on from the person receiving it to the person actually in control of the goods, *Whitehead v. Anderson*, 9 M. & W. 517.

¹⁵⁹—*Ante*, p. 144.

¹⁶⁰—80 N. Y. 244.

¹⁶¹—Resumption of lien, only, *Chandler v. Fulton*, 10 Tex. 2; *Allyn v. Willis*, 65 Tex. 65; *Dougherty Bros. v. Central National Bk.*,

*See Uniform Sales Act, Section 59, (1), (2).

†See Uniform Sales Act, Sections 57, 61.

Since stoppage *in transitu* merely reinstates the seller in the position of a lienor, his rights thereafter are identical with those already discussed as appertaining to an unpaid seller's lien and need not be again set out here.¹⁶²

4. NEITHER TITLE NOR POSSESSION RETAINED

Recovery of Price.—When the seller has parted with both title and possession he has the same right to sue the buyer for the purchase price as in any case when the title has passed.¹⁶³

Recovery of Possession.—He has no longer, however, any right at all in respect to the goods themselves. All his right of possession has ceased with his loss of actual possession. Though the buyer may flatly refuse to pay and even though he may have become insolvent and unable to pay, the seller can not retake possession, in the absence of fraud.¹⁶⁴ This is true even in equity;¹⁶⁵ and even though the buyer was insolvent at the time the contract was entered into, and knew himself to be insolvent, the seller who has parted with both title and possession can not retake the goods.¹⁶⁶

The whole idea is that the buyer has become the owner of the property and the seller a mere creditor to the

93 Pa. 227; *Jordan v. James*, 5 O. 88, 99; *Newhall v. Vargas*, 13 Me. 93; *Diem v. Koblitz*, 49 O. S. 41; *Kearney v. Union Pac. Rr. Co.*, 97 Iowa 719, 59 Am. St. 434.

162—See *ante*, p. 122.

163—See *ante*, p. 109. He is not limited to the actual value of the goods. *Brown v. Harris*, 139 Mich. 372.

164—*Smith Lumber Co. v. Scott County Co.*, 149 Iowa 272, 30 L. R. A. (n. s.) 1184; *Kramer v. Messner*, 101 Iowa 88; *Thompson v. Wedge*, 50 Wis. 642; *Frech*

v. Lewis, 218 Pa. 141; *Thompson v. Conover*, 32 N. J. L. 466, even as to goods delivered in part performance only; *Makaness v. Long*, 85 Pa. 158; *Neal v. Boggan*, 97 Ala. 611; *Holland's Assee. v. Cincinnati Co.*, 97 Ky. 454.

165—*Godwin v. Phifer*, 51 Fla. 442.

166—*Bell v. Ellis*, 33 Cal. 620; *Houghtaling v. Hills*, 59 Iowa 287; *Franklin Sugar Co. v. Collier*, 89 Ia. 69; *Freeman v. Topkis*, 1 Marv. (Del.) 174; *Walsh v. Leeper Co.*, Tex. 50 S. W. 630; *Talcott v. Henderson*, 31 O. S. 162.

amount of the purchase price. As the seller has no possession of the goods, he is in no better position than is any other creditor. He is simply an unsecured creditor with the rights and remedies of all unsecured creditors.¹⁶⁷

Recovery of Value of Goods.—The seller can not in such circumstances sue even for the value of the goods. He has become entitled to the purchase price, as a debt owing from the buyer, and he is restricted to the customary methods of suing on account of this debt.¹⁶⁸ If, however, the seller has only in part performed an entire contract at the time of the buyer's breach, he is not yet entitled to the full purchase price. In such case, if he does not choose to sue simply for his damages for breach of contract, he may bring an action, on the order of quasi-contract, for the actual value of such goods as have passed to the buyer.¹⁶⁹

Rescission Because of Fraud.—When, however, the sale has been induced by the fraud of the buyer, the seller can rescind the whole transaction and revest title to the property in himself, and having revested title in himself he can maintain replevin or otherwise repossess himself of the goods, as owner.

When the issue is between the seller and buyer, without relation to third persons, the courts seem to be in some confusion as to whether or not the effect of the fraud is such as to make the sale *void*, so that no title at all ever passed to the buyer, or merely voidable, so that title

167—This has been ameliorated by statute in some states to the extent of providing that statutory exemptions shall not apply to property for the purchase price of which the judgment was secured. *Howell v. Crawford*, 77 Ark. 12; *Roach v. Johnson*, 71 Ark. 344, right to sequester *pendente lite*; *Barton v. Sitlington*, 128 Mo. 164.

168—Woodward, *Quasi Contracts*, sec. 263.

169—*Wilson v. Wagar*, 26 Mich. 452; *Willston Coal Co. v. Franklin Paper Co.*, 57 O. S. 182; *Thompson v. Gaffey*, 52 Neb. 317, option to sue for breach of contract or *quantum valebit*; *U. S. v. Molloy*, 127 Fed. 953; *Bartholomew v. Markwick*, 15 C. B. (n. s.) 711, 109 Eng. Com. L. 711.

does pass to the buyer but subject to defeasance by the seller if he so desires. It is very common expression of the courts to refer to the sale as "void", but often, too, it is spoken of as "voidable". It is in fact, however, treated as "void" in many decisions, notably those which allow a suit in replevin to be maintained without any formality of rescission, even by way of demand upon the buyer.¹⁷⁰

On the other hand, it is very evident in some cases that, even as between the parties, the courts consider a title to have passed, subject to defeasance.¹⁷¹ Such are the cases in which it is held that a defrauded seller who might, on account of the fraud, have rescinded the contract has lost his right to repossession of the goods because of undue delay in acting. The courts do not give specific reasons for this, but the only harmoniously logical basis for it must be that title passed by virtue of the original contract; that the right to defeat it was lost by the delay and not that it passed by the delay.¹⁷² That title did pass by virtue of the agreement, although subject to avoidance, must be the basis also of those cases recognizing suit for the purchase price as an affirmation of the buyer's title; and of those similar cases in which the seller is held to have "ratified" the contract so as to fix title in the buyer.¹⁷³

The net result appears to be that, as between the par-

170—Butters v. Haughewat, 42 Ill. 18; Oswego Starch Co. v. Lendrum, 57 Iowa 573; Root v. French, 13 Wend. (N. Y.) 570; Hunter v. Hudson River etc. Co. 20 Barb. (N. Y.) 493; Loeffel v. Pohlman, 47 Mo. Ap. 574.

171—When the rights of third persons are under consideration there is no doubt but that the transaction is considered as having passed a title. See *post*, p. 225.

172—World Pub. Co. v. Hull, 81 Mo. Ap. 277; Johnson etc. Co. v.

Missouri Pac. R.R., 52 Mo. Ap. 407; McDonald v. Goodkind, 22 Mont. 491; Smith v. Chadron Bank, 45 Neb. 444; Wertheimer etc. Co. v. Faris, Tenn., 46 S. W. 336; Load v. Green, 15 M. & W. 216.

173—Moller v. Tuska, 87 N. Y. 166; Conrow v. Little, 115 N. Y. 387; Little Rock Bk. v. Frank, 63 Ark. 16; Gallup v. Fox, 64 Conn. 491; Mapes v. Burns, 72 Mo. Ap. 411; Chadron Natl. Bk. v. Tootle, 59 Neb. 44; Seeley v. Seeley-Howe Co., 130 Iowa 626.

ties, the court will treat the title as not having passed at all if the seller wishes it so treated, and acts thereon in time, or as having actually passed, if the seller desires so to consider it.¹⁷⁴

—**What Constitutes Fraud.**—What acts of the buyer will amount to a fraud upon the seller is a question of law to be decided by the court; whether those acts were in truth committed by the buyer is a question of fact for the jury.¹⁷⁵ As we have already seen, mere concealment of insolvency is not of itself such fraud as will permit rescission.¹⁷⁶ An intent, existing at the time of purchase, not to pay for the goods is, however, such fraud. The intent must be not to pay at all. “A mere intent not to pay for the goods when the debt becomes due is not enough; that falls short of the idea. The inquiry is not whether the buyer had reasonable grounds to believe he could pay the debt at some future time, and in some way, but whether he intended in point of fact not to pay it.”¹⁷⁷ If he did not intend to pay, there is such fraud as will justify rescission.¹⁷⁸ And the fact that a buyer knows he is insolvent at the time of purchase will be considered as evidence in respect to his intention. It “bears upon the question of *quo animo*, the intent, the fraudulent purpose.”¹⁷⁹

174—Clough v. London & Nw. Ry. Co., L. R. 7 Ex. 26, p. 34. It should be noted that the seller can not so far treat the transaction as void but that he must return to the buyer, before he can insist on possession of the goods sold, whatever of value he has received. Doan v. Lockwood, 115 Ill. 490; Moriarity v. Stofferan, 89 Ill. 528.

But an unnegotiated note is not considered as a thing of value in this sense, Thurston v. Blanchard, 22 Pick. (Mass.) 18; Nichols v. Michael, 23 N. Y. 264.

175—Freeman v. Topkis, 1 Marv. (Del.) 174.

176—*Ante*, p. 147.

177—Burrill v. Stevens, 73 Me. 395.

178—Oswego Starch Factory v. Lendrum, 57 Iowa 573; Belding v. Frankland, 8 Lea (Tenn.) 67; Hennequin v. Naylor, 24 N. Y. 139; Talcott v. Henderson, 31 O. S. 162.

179—Rowley v. Bigelow, 12 Pick. (Mass.) 307; Talcott v. Henderson, 31 O. S. 162; Belding v. Frankland, 8 Lea (Tenn.) 67.

While mere concealment of insolvency is not fraud, any *positive* misrepresentation, either express or by implication, may amount to fraud.¹⁸⁰ This is true even though the buyer be really solvent.¹⁸¹

Misrepresentation in respect to financial condition is, of course, not the only fraud that will make a sale voidable. This is simply the most frequent type of case. In general, any actual fraud in the inducement of the contract will permit of its rescission.

180—Schweizer v. Tracy, 76 Ill. 345; Weitheimer etc. Co. v. Faris, Tenn., 46 S. W. 336; Skinner v. Michigan Hoop Co., 119 Mich. 467;

Seeley v. Seeley-Howe Co., 130 Iowa 626.

181—Richardson etc. Co. v. Goodkind, 22 Mont. 462.

CHAPTER IV

BUYER'S REMEDIES AND RIGHTS

1. NEITHER TITLE NOR POSSESSION ACQUIRED

The discussion of the seller's rights and remedies has necessarily suggested the lack of right in the buyer which is the converse of the seller's rights. Obviously, for instance, if the seller has a right of continued possession until payment, the buyer has no right of possession until payment. Likewise, whenever the seller has no right to rescind a sale and take back the goods because of non-payment the buyer has a right to keep the goods without paying for them. These so obvious converse rights need not be repeated by positive expression. On the other hand, a discussion of other rights and remedies of the buyer will develop by their implied converse certain lack of right in the seller which was not referred to under the particular topic heading.

Breach of Contract.—If neither title nor possession has passed to the buyer, he has acquired no right in respect to the property itself. If the seller fails to perform according to the terms of the contract, the buyer is limited to an action against him personally for breach of contract. Having no title, the buyer can not bring replevin or other possessory action on the ground of title, and the law recognizes no other right of possession as a result merely of the contract of sale.¹ Even equity

1—Deutsch v. Dunham, 72 Ark. 141; Backhaus v. Buells; 43 Ore. 558; Chellis v. Grimes, 72 N. H. 104, "The mere fact that defendants committed a breach of their

contract, by refusing or failing to give the plaintiffs possession of the property * * * did not transfer the title to the plaintiffs. Their refusal to deliver the property was

will not grant specific performance except in certain cases of sale of an absolutely unique chattel.^{2*}

—**Measure of Damages.**—If the buyer does sue for breach of contract his measure of damage is, in accord with the general rule of damages, the sum which will put him in the same position financially as though the contract had been carried out. But this basic principle is, as usual, modified by the rule that the buyer must mitigate his damage so far as possible and must accordingly be presumed to have protected himself as soon after the seller's breach as he could reasonably be expected to do and by all reasonable means. Accordingly, the measure of his damage will be the difference between the price at which the seller had contracted to sell and the price at which the buyer could buy precisely similar goods in the market within a reasonable time after his knowledge of the seller's breach.^{3*}

not equivalent to a performance on their part. * * * Nor did the plaintiffs have the legal right of possession, since that right followed the title, which they never had." *Carpenter v. Glass*, 67 Ark. 135; *Platter v. Acker*, 13 Ind. Ap. 417; *Gibson v. Roy*, 28 Ky. L. R. 444.

2—There is some conflict, however, as to whether or not equity will decree specific performance in cases where the buyer has paid his money and the seller has become insolvent. *Livesley v. Johnston* 45 Ore. 30, "When, therefore, an award of damages would not put the party seeking equitable relief for the delivery of personalty in a situation as beneficial as if the agreement were specifically performed, or where compensation and damages would fall short of the redress to which he is en-

titled, the jurisdiction (of equity, for specific performance) is properly invoked, otherwise not. * * * Insolvency of the party against whom relief is sought, standing alone, will not confer jurisdiction to enforce specific performance. * * * The fact of insolvency, when combined with other causes for equitable interposition, may, however, become a potent or even controlling factor in determining the fact of jurisdiction." As to unique chattels see, *Lowther v. Lowther*, 13 Ves. 95, painting; *Falcke v. Gray*, 4 Drew. 651; *Pusey v. Pusey*, 1 Vern. 273.

3—*Saxe v. Penokee Lumber Co.*, 159 N. Y. 371; *Austrian & Co. v. Springer*, 94 Mich. 343; *Goodrich v. Hubbard*, 51 Mich. 530; *Grand Tower Co. v. Phillips*, 23 Wall. 471, price at nearest available place of purchase plus increased cost of

*See Uniform Sales Act, Section 68.

This rule is based on the assumption that the buyer *could* purchase similar goods on the market reasonably soon after the breach, and thus protect himself from damage naturally consequent upon his failure to receive the goods from the seller. If, however, he could not procure similar goods soon enough with reasonable effort, the rule of damages as stated could not be applied. In such case the amount of damage would be the financial loss, at least, resulting as a normal consequent upon the seller's failure to perform. But the burden of proof that similar goods could not have been reasonably procured is on the plaintiff. As illustration, in *Parsons v. Sutton*⁴ the claim was that Parsons had contracted to sell to Sutton certain paper to be used for printing a frontispiece for a magazine; that Parsons had failed to furnish it at the time agreed; that Sutton could not get other paper like it and had therefore to print his magazine without a frontispiece; and that because of this he had suffered financial loss in decrease of circulation, waste of printed matter which was to have accompanied the frontispiece and other normally consequent results. The court stated that "the ordinary rule of damage * * * is the difference between the contract price and the market price at the time and place of delivery. When the buyer can go into market and buy the article which the seller has failed to deliver, this is the only rule, as it offers the buyer full indemnity." The court further recognized that "special damages are allowed when this rule will not furnish full indemnity. If there is no market for the article where it is to be delivered, and it can not be had there with reasonable diligence, and the buyer suffers

transportation; *Schmertz v. Dwyer*, 53 Pa. 335; *David v. Witmer*, 46 Pa. Super. 307; *Tuttle etc. Co. v. Coaldale Co.*, 136 Iowa 382; *Holliday v. Hyland*, 43 Ind. Ap. 342; *Crescent Mfg. Co. v. Slattery*, 132 La. 917.

As to delivery by installments, see *Long Pole Co. v. Saxon etc. Co.*, 108 Va. 497; *Hewson-Herzog Co., v. Minnesota Brick Co.*, 55 Minn. 530.

4—66 N. Y. 92.

*See Uniform Sales Act, Section 67, (1), (2), (3).

damage because of the seller's failure to deliver, which is the proximate and natural consequence of such failure, such damage can be recovered." But the buyer "must not, by inattention, want of care or excusable negligence, permit his damage to grow and then charge it all to the other party."

In the particular case, Parsons was ready to deliver a few days after the time set, and there was no positive showing that delivery at that time would have been too late. Furthermore, the court said, "There is no proof that such paper as this contract called for is not usually to be found in the market, or that it could not, in the small quantity required, be delivered in a few days by manufacturers. All (Sutton) did was to go to dealers in paper a day or two after (the date for delivery) and try to buy paper like that which (Parsons) was to deliver, and they could find none. It does not appear that they made any further efforts. It does not appear that they could not find paper which would answer substantially the purpose. No reason is given why they did not try more than once to find the paper." Accordingly the court refused to allow recovery of the special damage. The case demonstrates clearly the breadth of the rule that, in general, only the difference between the contract price and the price at which the buyer can secure similar goods can be recovered as damage for the breach. "Very rarely, indeed, can there come a case where the vendee suffers special damages if, at the time and place of delivery, there was a market value for the article purchased by him. A market value at a given place presupposes that merchandise of that character was at that time and place sold or offered for sale, and thus the opportunity is presented the vendee of buying the article in the open market to be used for the special purpose intended, and of recovering of the defendant the difference between such market value and the contract price."⁵

5—*Saxe v. Penokee Lumber Co.*,
159 N. Y. 371.

But the buyer need only act *reasonably* in protecting himself after the seller's breach. Thus, in *Austrian & Co. v. Springer*,⁶ the seller announced early in May that he would not be able to fulfill his contract, which called for shipment on May 15th. The contention of the defendant, the seller, was that the price of glass in May was lower than in June, during the latter part of which the plaintiff had protected himself by purchasing similar goods. Evidence showed, however, that while dealers would give a "market price" during May and early June, they would not agree actually to furnish goods at such prices; in short, that dealers were dodging definite orders in expectation of a rise in price. This the court held sufficient to justify fixing the measure of damages by the market prices of late June or July.

The "market price" means market price at which the *buyer* could *purchase*. In reversing a case because the trial court had instructed the jury to allow the plaintiffs the difference between the contract price and the "wholesale" price at time of breach, the Supreme Court said, "The question is not one of wholesale price or retail price, and an instruction to measure the damage by either might be erroneous. The true test of proper compensation in such cases is what it would have cost the plaintiffs to procure at the point of delivery and at the time or times when it was reasonable for them to supply themselves, lumber of the kind and quality they were to receive on the contract. * * * So large an amount of lumber as was covered by this contract, they might, perhaps, have been able to procure at cargo prices; but we have no right to presume this, and if it were impracticable to supply themselves, except at retail rates, they were entitled to demand those rates of defendants."⁷ Similarly it has been held that if the buyer has actually protected himself by a purchase below the reported "market value" he can recover only the difference

6—94 Mich. 343.

7—Haskell v. Hunter, 23 Mich. 305.

between the contract price and what he actually had to pay.⁸

For a full discussion of the amount and proof of damage the reader is referred to works on damages. The discussion here is necessarily incomplete and is intended only to cover the broad principles, and the citations, while chosen to present as wide a variation of circumstances as possible, do not touch every type of case.

Recovery of Money Paid.—If the buyer has already paid a part of the price, or all of it, he may still, upon the seller's failure to pass title, sue to recover compensation for damage from the breach of contract.⁹ But, furthermore, he may disregard damages as such, which might be more or less than the exact amount of the purchase price, and sue specifically to recover the money which he paid.¹⁰ If he has received a part of the goods, and the amount of the purchase price which they represent is not definitely fixed by the contract, he must return such part before he is entitled to recover anything in such a suit.¹¹

Inspection Before Accepting Title.—Although the buyer who has not received title cannot compel the seller to pass the title, on the other hand, he can not be made to take title to goods which he did not agree to buy.

If the seller tenders goods which the buyer did not contract for, the buyer is in no way guilty of breach of

8—*Arnold v. Blabon*, 147 Pa. 372, approved in *Theiss v. Weiss*, 166 Pa. 9.

9—In such case the amount of recovery would be adjusted to cover what he had paid; if he had paid the full price, his recovery would be the full market value, instead of the mere difference between the two. *Hill v. Smith*, 32 Vt. 433; *Winside Bank v. Lound*, 52 Neb. 469.

10—*Joyce v. Adams*, 8 N. Y. 291; *Hayes v. Stortz*, 131 Mich. 63; *Williams v. Allen*, 10 Humph. (Tenn.) 337; *Altschul v. Koven*, 94 N. Y. S. 558; *Dalton v. Bentley*, 15 Ill. 420, but he can not maintain *both* actions; *Meador v. Cornell*, 58 N. J. L. 375; *Cleveland v. Sterrett*, 70 Pa. 204.

11—*Miner v. Bradley*, 22 Pick. (Mass.) 457; *Clark v. Baker*, 5 Metc. (Mass.) 452.

contract if he refuses to accept them, nor, of course, is the buyer liable to pay for them. "The delivery of property corresponding with the contract is a condition precedent to the vesting of the title in the vendee. The parties understand that the vendee is not bound to accept the property tendered, except upon this condition. * * * The latter is not bound to receive and pay for a thing that he has not agreed to purchase. * * *'¹²

When the contract has been in regard to a described, but not specifically identified, chattel, title, as we have seen, can not pass because of the lack of identity of the chattel. When thereafter the seller selects a particular chattel as the one to which he intends to pass title according to the contract, this of itself does not thrust title upon the buyer. He, the buyer, still has a right to say whether or not he will take the title. If what the seller offers is just what the buyer agreed to take, it will be a breach of contract for the buyer to refuse the title. But if what the seller offers is not what the buyer agreed to take, obviously the buyer is not at fault in refusing title to it.*

—**Right to Inspect.**—The buyer can not be compelled to accept or refuse title until he has had opportunity to see what the seller offers. This is obvious justice. Were he compelled to accept title to whatever unseen thing the seller should offer he might find himself saddled with title to what he did not contract for. On the other hand, were he to play safe, by refusing the proffered title, he might be guilty of breach of contract. Therefore the law allows him an opportunity to see what the seller offers before it will hold him guilty of breach of contract for refusing to accept title to it. This is often called the right of inspection.†

12—Reed v. Randall, 29 N. Y. 361; Chanter v. Hopkins, 4 M. W. 399.

*See Uniform Sales Act, Section 11, (1), (2).

†See Uniform Sales Act, Section 47, (1), (2).

Thus, in *Charles v. Carter*,¹³ the plaintiff, who had contracted to sell potatoes to defendant, sued for damages for breach of contract, because the defendant had refused to receive the potatoes from the carrier and refused to pay for them. The contract was for potatoes not specifically identified at the time. On shipment the plaintiff took a bill of lading in his own name and, as the court held, thereby kept title in himself. The defendant was notified of the arrival of the shipment and signified his willingness to take the title and possession, and to pay the price, if an inspection of the potatoes showed them to be such as he had contracted for. The privilege of inspection was refused by the railroad company and the defendant refused to receive the potatoes. The court held, that, if these circumstances were found as facts by the jury, the defendant was not guilty of a breach of contract, saying, as a proper instruction to the jury, "If you find that the conduct of the plaintiff and his agents at Kansas City was such that they declined and refused to permit an inspection of the potatoes by the defendant within a reasonable time after their arrival in Kansas City, and an inspection thereof was, in consequence, not made, then it was no longer the duty of the defendant to take such potatoes".¹⁴

—**Expense of Inspection.**—The inspection of goods to ascertain if they are in fact what the contract of sale, or its correlated contract of warranty, stipulates they shall be, is a right of the buyer. But it is solely for his benefit as a matter of protection. There is no forceful reason why the seller should pay the expense incurred

13—96 Tenn. 607.

14—*Livesly v. Johnson*, 45 Ore. 30; *Harper v. Baird's Admr.*, 3 Penna. (Del.) 110; *Deutsch v. Dunham*, 72 Ark. 131, "The contract being executory, it is clear that appellant could not be compelled to accept the lumber until

he had an opportunity to inspect it in order to ascertain whether it was such as appellees stipulated to saw." *Osborn v. Gantz*, 60 N. Y. 540; *Croninger v. Crocker*, 62 N. Y. 151; *Lorymer v. Smith*, 1 Barn. & Cress. 1.

by the buyer in thus protecting himself. If he tenders the precise goods contracted for, in the manner agreed upon, he has performed his contract. If the buyer chooses to go to expense in making sure of this performance, it is the buyer's right to do so, but it should also be at his cost. This seems to be assumed as the rule, since no attempts by a buyer to recover such expense are found in the cases.¹⁵

There are, however, some cases in which inspection has revealed that the seller did *not* perform his contract, in which the buyer has been allowed to recover the cost of the inspection. The theory of this recovery—whether on the ground of damages from the seller's breach, quasi-contract, or otherwise—is not clear. The results are obviously just, at least. If the examination develops the fact that the seller has not performed his contract, but is guilty of a breach, any damage which the buyer suffered by the breach is, logically, recoverable. Damage suffered through use of an article which does not conform to the terms of the contract, before that non-conformity is discovered, should come within this rule. So also, even if there be no damage from use of the defective article, the expense to which the buyer has reasonably put himself on the supposition that the seller has properly performed should be recoverable, as a consequence of the seller's breach.¹⁶

15—In *Lincoln v. Gallagher*, 79 Me. 189, there is a *dictum* to the effect that the seller must bear the expense of providing the buyer with a reasonable *opportunity* to inspect.

16—That this is the rule, is indicated in *Ruben v. Lewis*, 46 N. Y. S. 426, buyer's expense for transportation held recoverable; *Stafford v. Pooler*, 67 Barb. (N. Y.) 143, limited to necessary expenses; *Phila. Whiting Co. v. Detroit Lead Works*, 58 Mich. 29,

apparently as damages from the seller's breach of the contract of sale.

In ascertaining whether the goods do conform to the contract or not, it may happen that the buyer will necessarily have used or otherwise have destroyed a certain amount of the goods tendered. If the goods should turn out not to conform to the agreement and the buyer should therefore reject them, question might arise as to the seller's right to compensation

—**Waiver of Right.**—The buyer may waive this right of inspection if he chooses. That is, he may accept the title without looking at the goods, or he may refuse the title without claiming an opportunity to inspect. In the one case he gets title to the goods whether they conform to the contract or not; in the other, he is guilty of breach of contract if they do conform to the contract. But he can not be deprived of the opportunity nor legally refused it.

—**Effect of Seller's Delivery to a Carrier.**—The mere fact that the goods, as specified by the seller, were accepted by a carrier for delivery to the buyer does not imply any intent on the buyer's part to accept them, nor any legal (constructive) acceptance by him, unless they do conform to the conditions of the contract. We have seen that if goods conforming to the terms of the contract are delivered to a carrier for the buyer, title, if not already passed, is presumed to pass then. If the theory behind this passing of title be, as was suggested in that discussion, that the carrier is legally the agent of the buyer to accept title, then the carrier might also be the buyer's agent to inspect. But whether this be so, or not, the carrier is not so far the buyer's agent that receipt of goods which are not the ones contracted for will vest title in the buyer. It can not be dogmatically stated whether this right of inspection does not exist when proper goods are delivered to a carrier, or whether it does exist and is exercised by the carrier as the buyer's

for those destroyed. In *Philadelphia Whiting Co. v. Detroit Lead Works*, 58 Mich. 29, the court said specifically that in such case the seller "would be liable for all necessary charges and expenses in testing the article", and held that he could not recover the value of the goods used in making the test which showed the seller's breach of contract. It is clear, of

course, that he could not recover the contract price, as such. His right to recover in quasi-contract appears not specifically to have been decided, except in the case just mentioned, and the analogous propositions in quasi-contracts are themselves so much in dispute as to leave that authority an open question.

agent. But at least it seems reasonably clear that title passes on delivery of proper goods to the carrier, without further act on the buyer's part; and that title does not pass on delivery to the carrier of goods which are not those contracted for. "To constitute a delivery to the carrier a delivery to the consignee so as to pass the title and make the consignee liable for goods sold and delivered, the goods must conform in quantity as well as quality with those named in the order."¹⁷ Hence, if the goods

17—Barton v. Kane, 17 Wis. 38; Diversey v. Kellogg, 44 Ill. 114; Pierson v. Crooks, 115 N. Y. 539.

Occasional *dicta* imply that some sort of a "conditional title" does pass on delivery to a carrier, which may be "rescinded" by the buyer. Kuppenheimer v. Wertheimer, 107 Mich. 177; Magee v. Billingsley, 3 Ala. 679.

This proposition is not logical. The whole theory of the law is that title can not be vested in a buyer without his consent. His agent, the carrier, has no authority to assent to title in anything but the goods contracted for. The buyer himself cannot logically be said to have assented to taking title in goods not contracted for until he has had a chance to learn that other goods than those contracted for have been offered to him. If the proper goods have been offered, the buyer's inspection does no more than verify the validity of the carrier's assent. But if other goods have been delivered the buyer's inspection is the first opportunity for his assent to be given at all; until such inspection there is no assent, and without assent there can not logically be title in the buyer.

The inaccuracy of the state-

ments referred to is further indicated by the case of Gardner v. Lane, 12 Allen (Mass.) 39. One Wonson had contracted to sell to the plaintiff 131 bbls. of #1 mackerel. On pretended performance of this contract he delivered to plaintiff a number of barrels, which in fact contained #3 mackerel and some which contained no mackerel at all but only salt. At a proper time the plaintiff examined the barrels and elected to take title to the goods despite non-conformity with the contract. Before this inspection, however, though after the delivery to the plaintiff, the defendant, as a creditor of Wonson, had levied on the goods as Wonson's property. The court held that it was Wonson's property at the time of the levy, despite the plaintiff's possession of it and his subsequent willingness to keep it, because at that time the plaintiff had never consented to the vesting of title in him. Accord, Alamo Cattle Co. v. Hall, 220 Fed. 832; Dube v. Liberty Clothing Co., 153 N. Y. S. 577, 91 Misc. 64.

Of course, if the goods delivered to the carrier *do* conform to the terms of the contract, title passes at that time, not because the seller can thrust even a temporary

selected by the seller and consigned to the buyer are found on inspection not to conform to the terms of the contract, the buyer may refuse to accept them, or to pay for them, on the ground that he did not buy them.¹⁸

—**Waiver Through Delay.**—Even if the buyer himself receives possession of them, he is not presumed to have waived their non-conformity with the contract and to have taken title anyhow, until he has had a reasonable time and opportunity to find out that they do not conform to its terms.

“And what is a reasonable time is usually a question of fact, and not of law, to be determined by the jury upon all the circumstances, including as well the situation and liability of injury to the vendor from delay as the convenience and necessities of the vendee.”¹⁹ In the particular case from which the quotation is taken, the delay in examining the quality of iron in certain hoops was ten days after the carrier had unloaded them, and the court said, this “was not so great that the court can say, as a matter of law, that it was unreasonable, and we are concluded by the finding of the referee from re-examining the question of fact.” In *Philadelphia Whiting Co. v. Detroit Lead Works*²⁰ the sale was whiting, to be of the best quality for use in making putty. The

title on an unwilling buyer, but because the carrier, as buyer's agent, accepts the title. If one accepts the theory of the carrier's agency to accept title to goods which conform to the contract—and this is the only theory which the decisions will harmoniously support—there is nothing inconsistent in the proposition that title to goods not conforming to the contract does not pass at all until the buyer's inspection and acceptance, but that title to goods which do conform to the contract passes on delivery to the carrier.

That this last proposition is correct, see, *Skinner v. Griffith & Sons*, 80 Wash. 291, 141 Pac. 693.

18—*Livesly v. Johnston*, 45 Ore. 30; *Diversey v. Kellogg*, 44 Ill. 114; *Pierson v. Crooks*, 115 N. Y. 539; *Scranton v. Mechanics Trading Co.*, 37 Conn. 130; *Croninger v. Crocker*, 62 N. Y. 151, tender of goods to which the seller's title was defective; *Columbian Iron Works v. Douglass*, 84 Md. 44; *Fogel v. Brubaker*, 122 Pa. 7.

19—*Pierson v. Crooks*, 115 N. Y. 539.

20—58 Mich. 29.

buyer received the shipment and used 42 barrels, out of the 300 bought, at the rate of 3 or 4 per day. After such use the buyer began to receive complaints as to the quality of its putty and thereupon notified the seller that it would hold the remaining barrels as the seller's property. The court held that it had been properly left to the jury to say whether or not the duration and character of the examination were reasonably necessary to determine the quality of the whiting, and that if the jury found that such examination was reasonable, the buyer had not lost its right to refuse title to the rest of the goods.^{21*}

If the court, or jury, decides that the buyer *has* kept the goods tendered for an unreasonable time, without inspecting them or objecting to them, then it is assumed that he has chosen to keep them despite the difference between what they are and what they should have been. "The delivery of property corresponding with the contract is a condition precedent to the vesting of the title in the vendee. The parties understand that the vendee is not bound to accept the property tendered, except upon this condition. * * * The latter is not bound to receive and pay for a thing that he has not agreed to purchase; but if the thing purchased is found on examination to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract, or he will be presumed to have acquiesced in its quality."²²

21—*Reuben v. Lewis*, 46 N. Y. S. 426; *Saunders v. Jameson*, 2 C. & K. 557; *Gordon v. Waterous*, 36 Up. Can. Q. B. 321, delay justified by fact that, seller having failed to deliver as expected, buyer had secured other goods and had no reason to open seller's packages at once.

22—*Reed v. Randall*, 29 N. Y. 361. This result does not follow

if the retention of possession is perfectly consistent with the idea of the buyer's rejection and of title still resting in the seller. Thus, in *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, the buyer's acts did not preclude him from denying title, because they had been accompanied with a notice that he was acting in the seller's interest only. Cf. *Zabriskie v. Central*

*See Uniform Sales Act, Section 48.

A pointed illustration is the case of *Cream City Gas Co. v. Friedlander*.²³ The plaintiff sued to recover money it had paid defendant for certain soda ash. The ash when delivered was inspected by the plaintiff and found not to conform to the implied terms of the contract and the plaintiff notified the seller that it would not accept. Thereafter, however, the plaintiff "made a practical test of the material by trying to make glass therefrom," and demonstrated that it did not accord with the contract terms. This action, the court held, amounted to an acceptance of the ash and precluded the plaintiff from rejecting it. "It seems clear," said the court, "that the plaintiff was entitled to a reasonable time after actual receipt of the material to exercise the right of rejection in case the goods did not conform to the contract. If this fact could only be ascertained by a practical test, the plaintiff also had the right, within such reasonable time, to make such practical test, using only so much of the material as was reasonably necessary for the purpose, without thereby losing the right of

Vermont R. R., 131 N. Y. 72; *Gold Ridge Mining Co. v. Tallmadge*, 44 Ore. 34.

As to the presumption of acceptance of the goods as tendered, see also, *Barton v. Kane*, 17 Wis. 38, "When goods prove defective in quality, it is, in general, incumbent on the purchaser to notify the seller of his non-acceptance on that ground, else he is deemed to waive the objection, and to consent to keep and pay for them according to the terms specified. In such case, it is considered sufficient evidence of acceptance that the purchaser has not returned or offered to return the goods, or notified the seller of his non-acceptance." *Freedman v. Shoe Mfg. Co.*, 122 Pa. 25, keeping shoes in stock for two months and selling

some of them held an acceptance. *Pullman Car Co. v. Metropolitan Rr. Co.*, 157 U. S. 92; *Coplay Iron Co. v. Pope*, 108 N. Y. 232; *Fisher v. Samuda*, 1 Camp. 190; *Doan v. Dunham*, 79 Ill. 131; *Titley v. Enterprise Co.*, 127 Ill. 457; *Thompson v. Libbey*, 35 Minn. 443.

In *Diversey v. Kellogg*, 44 Ill. 114, it is suggested that the retention of the goods would make the buyer liable for their *value*, as distinct from their contract price. So also, *Basin & Co. v. Conley*, 58 Md. 59.

Unreasonable retention, and use, of a part of the goods tendered was held to constitute an acceptance of the whole of the goods, in *Emery Thompson Co. v. Graves*, 91 Conn. 71, 98 Atl. 331.

23—84 Wis. 53.

rejection. But this test is plainly for the purpose only of enabling the purchaser to decide whether the material conforms to the contract. If the fact can be determined by inspection alone, the test is not necessary, and the use of the material, therefore, clearly unjustifiable. Now in this case, the plaintiff's officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need any test, they took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection, if they proposed to insist upon their right to reject. They must do no act which they would have no right to do unless they were owners of the goods. Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property if such rejection was rightful. Plaintiff had no right to use any part of it. It is claimed that the use was simply for the purpose of providing evidence of unfitness for the purpose of the trial of this case; but one has no right to use his opponent's property for the purpose of making evidence. The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected and was owned by defendant."

Inspection Before Payment.—There is a right of inspection whose purpose is entirely different from the one just discussed, but which is often confused with it. This is the right to inspect as a condition precedent to payment. The right of inspection just discussed exists in order that the buyer may know whether the goods offered are those he contracted for, before he takes or refuses the *title* to them. It presupposes that the contract has been in respect to unidentified, though described, goods so that title did not pass at the time of making the

contract, or that, for some other reason, title has not already passed to the buyer.

But when the parties have contracted concerning a specifically identified chattel, the rule is that title presumably passes at the time the contract is made, regardless of payment or change of possession. When, therefore, the possession of such a chattel is offered to the buyer and payment demanded, the buyer's inspection or non-inspection can not affect the title—title is already in the buyer.

If he has contracted to pay at a certain date, prior to delivery of the goods to him, he would break the contract by refusing to pay. But if delivery of the chattel is to precede, or to be concurrent with, payment, he need not pay until the very chattel he bought is delivered or offered to him. Furthermore, he need not take the seller's word that the chattel offered is the one contracted for; he has the right to see for himself. If this opportunity to see for himself is not given, he is not in breach of the contract if he refuses to pay.* The title is none the less in him, but he does not have to pay until he receives possession, and he does not have to take possession without knowing that he is getting the chattel he contracted for.

This right to inspect before payment may, like the right to inspect before taking title, be waived, and such waiver may be implied from the terms of the contract and the acts of the parties. An agreement, for instance, that the goods are to be sent to the buyer "C. O. D." may preclude his right to any inspection before payment. Such may be the effect of a failure to examine the goods at a reasonable time, or contracting for their delivery in such a way that inspection before coincident payment is impracticable.^{24†}

24—Sawyer v. Dean, 114 N. Y. S. 793, agreement to pay on presentation of bill of lading; Law-

*See Uniform Sales Act, Section 47, (1), (2).

†See Uniform Sales Act, Section 47, (3).

This waiver of inspection before payment, however, does not necessarily affect title to the goods. If title has already passed, at the time of the contract, or by seller's delivery to a carrier of goods conforming to the contract, inspection or failure to inspect does not affect it; it is in the buyer and remains in him. On the other hand, if the goods received by the buyer are not in fact the goods he contracted for, neither his mere physical acceptance of them, as we have seen, nor his payment for them, necessarily implies a willingness to take title despite the seller's failure to perform.

Performance of Conditions by Seller.—Both of these rights of inspection are for the purpose of giving the buyer opportunity to learn whether the thing offered by the seller is in fact what the buyer contracted to take. This, then, involves a question in each case of just what it was that the seller agreed to transfer and the buyer to accept.

—**What Conditions Are.**—Whether or not the seller *has* tendered the goods contracted for by the buyer depends obviously on the terms of the contract; that is to say, upon those terms of the contract which relate to the *identity* of the goods intended to be covered by it. These terms of identifying description, to which goods tendered must conform to be the goods contracted for, are usually called “conditions.”²⁵

ton & Sons Co. v. Mackie Grocery Co., 97 Md. 1, agreement to pay on delivery to a named place; Polenghi Bros. v. Dried Milk Co., 49 Sol. Jr. 120.

25—Although the term “warranty” is usually applied to those terms of description which do not affect the precise identity of the goods contracted for, it is sometimes used of those parts of description for non-conformity to

which the buyer may refuse them. Scranton v. Mechanics Trading Co., 37 Conn. 130; Norrington v. Wright, 115 U. S. 188.

But, as some courts allow rejection of title of goods which are indubitably those contracted for, but which do not conform to the terms of the contract in other respects than identity, (see p. 182) the use of the word “warranty” itself indicates nothing.

Furthermore, it may be possible that the seller tenders to the buyer precisely the goods contracted for, in inherent nature, but does not tender them at the place agreed upon, or at the right time, or in the right way, etc. In such case, if the matter failed in is of essential importance in the agreement, the seller has not performed his agreement. And not having himself performed, he cannot sue the buyer if the latter refuses to pay. It might be said that, in these cases the very goods described in the contract having been tendered, title would be presumed to have passed, although the buyer incurs no "liability" as to payment until the seller shall have performed according to the terms. But, on the other hand, the goods not having been specific at the time of the making of the contract, title could not have passed then and would not pass thereafter without some actual or constructive assent of the buyer. The buyer not having accepted the goods, the title would not be in him, whatever might have been his reason for refusing to take it. The question of title is not specifically raised in the cases involving these circumstances, but the courts do agree that, at least, there is no *liability* on the part of the buyer.

These provisions of the contract, also, since they must be complied with to make the buyer liable, are called "conditions." And, indeed, in some cases such terms as the time and place of delivery—which seem normally related to performance rather than to identity—are said to be essential to the identity of the goods. Thus one court says, "The date of the shipment is a material element in the identification of the property."²⁶ Other courts treat them as having the same effect, without specifically saying that they do affect the identity. For example, the Supreme Court says,²⁷ "A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a war-

26—Clark v. Fey, 121 N. Y. 470.

27—Norrington v. Wright, 115 U. S. 188.

ranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.''²⁸ It seems unavoidable, therefore, to discuss both kinds of these conditions, viz., those relating to performance as well as those affecting identity, on whose performance by the seller the buyer's liability depends, without particular distinction.

—**What Are Conditions.**—This brings us to the inquiry, what terms in the contract are "conditions" to which the seller must conform to render the buyer liable. When the contract is for the sale of an article specifically identified at the time, a tender by the seller of *that particular article* would seem clearly to be a performance of his agreement, so far as his part in the transfer of title is concerned, no matter what statements he may have made in regard to the character or qualities of that article. This is fully sustained by the authorities which hold that title to a specific chattel is presumed to have passed at the time of the contract,²⁹ in conjunction with those

28—"The quality is a part of the description of the thing agreed to be sold, and the vendor is bound to furnish articles corresponding with the description. If he tenders articles of an inferior quality, the purchaser is not bound to accept them." *Pierson v. Crooks*, 115 N. Y. 539; "What is sold is not 300 tons of rice in gross, or in general. It is 300 tons of *Madras* rice to be put on board at *Madras* during the particular months", *Bowes v. Shand*, 2 App. Cas. 455; *Salmon v. Boykin Co.*, 66 Md. 541, quantity and place of shipment; *Crane v. Wilson*, 105 Mich. 554; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255; *Pope v. Porter*, 102

N. Y. 366; *Rommel v. Wingate*, 103 Mass. 327; *Cromwell v. Wilkinson*, 18 Ind. 365; *Filley v. Pope*, 115 U. S. 213, "The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer." *Van Valkenberg v. Mason*, 45 Neb. 654. Quantity also may be a condition precedent, *Tamvaco v. Lucas*, 1 Ell. & Ell. 592; *Downer v. Thompson*, 2 Hill (N. Y.) 137, delivery of too much; *Cunliffe v. Harrison*, 6 Exch. 903, *idem*; *Hoffman v. King*, 58 Wis. 314. Cf. *Brownfield v. Johnson*, 128 Pa. 254.

29—*Ante*, p. 19 ff.

which hold that a specific chattel so sold can not be returned to the seller in the absence of fraud.³⁰

The converse of this is equally true; a contract to sell a specific chattel is not satisfied by a tender of some other chattel, even though the one tendered has all the qualities ascribed to the one contracted for. Thus, in *Columbia Iron Works v. Douglass*,³¹ the contract was for the sale of steel scrap from the plates of certain boats which the seller was building. The court held that a tender of steel scrap which was not from the plates of those boats was not performance of the contract, even though that which was tendered was of precisely equal quality. "It was," said the court, "an agreement for the purchase by the appellee and for the sale by the appellant of a specific, designated thing; and that thing was not steel of a described grade free from a named percentage of sulphur and phosphorous, but steel scrap from the plates, beams, and angles of the United States cruisers built by the appellant. This was the named and designated—the specific and identical—thing contracted for; and the substitution of any other or different material, no matter what its quality or chemical test might be, was a clear breach of the undertaking entered into by the parties. When a person buys a particular thing, he can not be compelled to take some other thing, even if like the thing he bought. He has a right to insist on the terms of his contract."

When the contract relates to goods not existing, or not specific, at the time, then all terms in the description which are reasonably necessary to identify the goods tendered with the goods intended by the contract are conditions and must be complied with. In general, all terms which the parties may reasonably be supposed to have considered essential to the correct identification are a part of the description which must be complied with. If, for instance, one agree to sell "blue vitriol, sound, and

30—*Post*, p. 177. Cf. also, *Webster, Gruber Co. v. Dryden*, 90 Iowa 37; *Scott v. Buck*, 85 Ill. 333. 31—84 Md. 44.

in good order," his contract is not performed by a delivery of vitriol, however sound and in good order, which is not *blue* vitriol. "Saltzberger," or "green," vitriol does not suffice.³² It is impossible to formulate a rule as to just which terms of a contract are essential to the identification of the goods intended and which are mere description of character or quality collateral to the identification.³³ Whether a particular term is in fact an essential part of the contract of *sale*, or is only an obligation collateral to the matter of passing title, is a matter that will be decided by each court to suit itself in the particular case. For precedent decisions, which may by the similarity of their facts influence a particular judge, one must refer to the digests.

—**Opinions as Conditions.**—A statement of *opinion* as to the characteristics or qualities of the goods contracted for, is not a part of the identifying description, even though, in expression, it may be interwoven with the description. It is not a condition precedent to performance, therefore, that the goods shall actually conform to that statement of opinion.

The great difficulty is to distinguish precisely between description for the purpose of identification and mere coincident expressions of opinion. There are no rules for determining this—it is a question of particular conclusion. But if this question be settled in the particular case, the law is certain; description must be complied with, opinion is immaterial.³⁴

32—Hawkins v. Pemberton, 51 N. Y. 98.

33—As to the effect of statements, by way of description or otherwise, in regard to goods which are specific and identified at the time of sale, see the discussion under "warranty," *post*, p. 182.

34—Bartlett v. Hoppock, 34 N. Y. 118, a statement by a hog-

drover to an experienced market man that his hogs were "suitable for New York market" was a mere expression of opinion; Farrow v. Andrews, 69 Ala. 96; Power v. Barham, 4 Ad. & El. 473, "It was, therefore, for the jury to say, under all circumstances, what was the effect of the words, and whether they implied a warranty of gen-

—**Implied Conditions.**—An important proposition in respect to these conditions, or terms of the description, is that they need not be wholly express. Terms which must be complied with to constitute performance may be implied by the other provisions of the contract.*

Thus, "It is understood of every contract for the future sale and delivery of an article of merchandise, (not specific at the time), even without express terms, that it shall be of merchantable quality." And this is a condition precedent.³⁵ *Howard v. Hoey*,³⁶ arose out of a sale of ale. On delivery it was discovered to be sour, ropy and unfit for use and the buyer refused to keep it. The seller contended that there was no express statement in the contract that it should not be sour. But the court held an express statement to be unnecessary, saying, "It stands conceded, that, where the contract is executory, or, in other words, to deliver an article not defined at the time, * * * the promisee can not be compelled to put up satisfied with an inferior commodity. The contract always carries an obligation that it shall be at least merchantable—at least of medium quality and goodness. If it come short of this it may be returned after the vendee has had a reasonable time to inspect it. * * * There is always a warranty or promise implied that the indeterminate thing to be delivered should, at least, not have any remarkable defect."³⁷ The implication is not that the goods otherwise described shall be of the *best* quality, but only that they shall be of a normally good

uniness, or conveyed only a description, or an expression of opinion." *Jendwyn v. Slade*, 2 Esp. 572.

The frequency with which statements by the seller in regard to the goods are held to be only expressions of opinion is vigorously condemned by the Supreme Court of Kansas, in *Foote v. Wilson*, 104 Kan. 191, 178 Pac. 430.

This is a question for the jury, *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595; *Allen v. Lake*, 18 Q. B. 560.

35—*Reed v. Randall*, 29 N. Y. 361.

36—23 Wend. (N. Y.) 350.

37—*Farren v. Dameron*, 99 Md. 323.

*See Uniform Sales Act, Sections 12, 13, 14, 15.

quality.³⁸ Usually, in cases where goods are to be shipped, the implied statement is as to their quality and condition at time of shipment only. This is usually the time of constructive delivery to the buyer.³⁹

Other terms that may be implied from the circumstances are discussed under the topic of "Warranties".⁴⁰

—**Waiver of Performance of Conditions.**—Assuming that some particular term in the contract is identifying description of the goods, and therefore a condition precedent to the seller's exact performance, the question may arise—what is the result if the buyer chooses to accept title despite the defect?

Does he, by accepting the goods tendered in place of the ones contracted for, waive all right to recover damages suffered through the seller's failure to tender the goods described? In other words, does he, by accepting the goods actually tendered, legally accept them in full satisfaction of the seller's obligation? Authority is very much confused upon this point. The New York courts rather indicate that if the term with which compliance has been waived is truly a *condition*, the waiver extends not only to the passing of title but to all claims for damage as well, *if* the acceptance is made *with knowledge* that the condition is not complied with. Occasional decisions in other jurisdictions intimate a similar rule.⁴¹

There is tendency of the courts, however, to hold, in

38—Sweat v. Shumway, 102 Mass. 365; Harris v. Waite, 51 Vt. 481; Tennessee Co. v. Leeds, 97 Tenn. 574.

39—Leopold v. Van Kirk, 27 Wis. 152; Mann v. Everston, 32 Ind. 355.

40—*Post*, p. 139.

41—Reed v. Randall, 29 N. Y. 358; Coplay Iron Co. v. Pope, 108 N. Y. 232; Carleton v. Lombard, Ayres & Co., 149 N. Y. 137; Max-

well v. Lee, 34 Minn. 411; Cheboygan Paper Co. v. Eichberg, 184 Mich. 30; America Theater Co. v. Siegel, Cooper & Co., 221 Ill. 145; but cf., Underwood v. Wolf, 131 Ill. 425; Athletic Club v. Lumber Co., 18 Tex. Civ. Ap. 161; Hurley-Mason Co. v. Stebbings, 79 Wash. 366, 140 Pac. 381. But cf., Springfield Shingle Co. v. Edgcome Mill Co., 52 Wash. 620.

one way or another, that the buyer does not lose his right to damage for non-performance by accepting title to the goods as tendered.^{42*}

The matter is, however, rather hopelessly confused by terminology. Those terms of the description which serve to *identify* goods contracted for must be complied with before the contract of sale can be properly performed; they are truly conditions precedent. Those terms which may describe, but do not identify, the goods are not conditions, and are usually called "warranties." They do not relate to the passing of title. As a warranty, in this narrow sense, does not relate to title, the goods could not be rejected by the buyer for breach of it—they would still be the identical goods he agreed to take. Hence the right to recover damages for breach of "warranty" is not lost by acceptance. Consequently it is possible for courts to give mouth-honor to a rule that no right of action for damages from breach of conditions will survive acceptance of the goods, and yet in fact allow action for breach of what even themselves would call a condition if the buyer had chosen to reject the goods as tendered, but what, for the purpose of allowing the action, they do choose to call a "warranty." The fact therefore that courts *say* "conditions do not survive acceptance" does not necessarily put them in the position of so holding in fact.⁴³

42—*Boston Woven Hose Co. v. Kendall*, 178 Mass. 232; *Underwood v. Wolf*, 131 Ill. 425; *Dalton v. Bunn*, 137 Ala. 175.

43—*Cf.*, *Springfield Shingle Co. v. Edgecome Mill Co.*, 52 Wash. 620, and *Hurley-Mason Co. v. Stebbins*, 79 Wash. 366, 140 Pac. 381; *Fairbank Co. v. Metzger*, 118 N. Y. 260, where the statement concerning the goods is clearly part of the identifying description, but is called a "warranty" and as such

is allowed to survive.

Morse v. Union Stock Yards, 21 Ore. 289, 14 L. R. A. 157, 28 Pac. 2; *Lewis v. Rountree*, 78 N. C. 323; *Morse v. Moore*, 83 Me. 473, 23 Am. St. 783, 22 Atl. 362.

In *Day v. Poole*, 52 N. Y. 416, the court got around the rule largely on the argument that the buyer had accepted the goods on the seller's promise that he would make good for the defect.

The subject of "warranties",

*See Uniform Sales Act, Section 11, (1), 49.

2. POSSESSION, BUT NOT TITLE, ACQUIRED

The rights of a buyer who has received possession of the goods but not title to them are, of course, consistent with the seller's rights. These latter have already been discussed under the appropriate heading.⁴⁴

Right to Keep Possession.—So long as the buyer is not in default, if the contract provides, expressly or impliedly, that he shall have possession he is entitled to keep possession and can sue the seller for any trespass upon that right.⁴⁵

The buyer's right of possession is not opposed to the seller only, but he can maintain actions of trespass, replevin, etc., against other persons who unlawfully interfere with his possession.⁴⁶

Right to Acquire Title.—The buyer also has the right to acquire title by payment, or performance of whatever may be the condition, according to the terms of the contract. A buyer who is not in possession can not acquire title, unless he can get a decree of specific performance in equity, without some act of passing title on the part of the seller. But when the buyer is in possession of the goods, his mere tender of payment, or of performance of other conditions, is sufficient to vest title

what they are, when they exist, rights arising therefrom, etc., is discussed *post*, p. 180.

44—*Ante*, p. 99.

45—*Clark v. Clement*, 75 Vt. 417; *Richardson v. G. W. Mfg. Co.*, 3 Kan. Ap. 445; *Wellden v. Witt*, 145 Ala. 605, 40 So. 126; *Western Union Sewing Mach. Co. v. Sachs*, 67 N. Y. S. 2; *Cushman v. Jewell*, 7 Hun. (N. Y.) 525, even after default, if the seller has waived the default.

Even if the buyer is in default,

some courts hold that the seller can not retake possession without a demand for performance, *New Home etc. Co. v. Bothane*, 70 Mich. 443.

46—*Harrington v. King*, 121 Mass. 269; *Aldrich v. Hodges*, 164 Mass. 570, even though the seller also has brought an action for conversion against the same defendant; *Freedman v. Phillips*, 82 N. Y. S. 96; *Lord v. Buchanan*, 69 Vt. 320, 60 Am. St. 933; *Messenger v. Murphy*, 33 Wash. 353.

in himself.⁴⁷ This right to acquire title he can also transfer to other persons.⁴⁸

Even after the buyer has lost possession through the retaking by the seller, it has been held that the right to acquire title by tender of payment is still in him.⁴⁹ But this must presuppose that the seller's retaking has not been by way of a proper rescission of the contract.

Right to Return the Goods.—If the buyer is in default, he can not avoid further performance of the contract by returning the possession of the goods, against the seller's will. The obligation, or promise, to return the goods in case of default is for the benefit of the seller, not of the buyer, and it does not authorize the buyer to return the goods and escape further payments.⁵⁰

Whether the seller, who of his own volition retakes possession of the goods, can thereafter hold the buyer liable for further payments, has already been discussed.⁵¹

Right to a Return of Money Paid.—If the seller exercises his right to retake possession he need not, except as provided by statute, return any of the buyer's payments as a condition precedent to the retaking.⁵²

47—*Birmingham Ry. Co. v. Bowers*, 110 Ala. 322; *Currier v. Knapp*, 117 Mass. 324; *Hervey v. Dimond*, 67 N. H. 342, 68 Am. St. 673, 39 Atl. 331; *Albright v. Meredith*, 58 O. S. 194; *Christenson v. Nelson*, 38 Ore. 43, 63 Pac. 648, even though the tender be made *before* performance is due; *Cushman v. Jewell*, 7 Hun. (N. Y.) 525, *idem.*; *Pease v. Teller Corp.*, 158 Cal. 807.

48—*Bailey v. Colby*, 34 N. H. 26, 66 Am. Dec. 752; *Christenson v. Nelson*, 38 Ore. 43, 63 Pac. 648.

The sub-buyer will acquire title upon the original buyer's tender of payment, *Day v. Bassett*, 102

Mass. 445; *Cushman v. Jewell*, 7 Hun. (N. Y.) 525.

49—*Miller v. Steen*, 30 Cal. 402; *Foundry Co. v. Pascagoula*, 72 Miss. 608.

But the buyer can not vest title in himself by tender of payment after the goods have been destroyed while in the seller's re-possession. *Hollenberg Music Co. v. Barron*, 100 Ark. 403.

50—*Robinson's Appeal*, 63 Conn. 290; *Finlay v. Ludden & Bates Co.*, 105 Ga. 264; *Smalback v. Wolfe*, 46 N. Y. S. 968; *Ainsworth v. Rhines*, 60 N. Y. S. 876.

51—*Ante*, p. 106.

52—*Ante*, p. 103. See also *White*

The buyer's right after such retaking to get back what he has paid, less reasonable compensation for use, is another matter and is recognized by some decisions. A number of courts, notably in jurisdictions which require "disaffirmance" as a condition precedent to retaking of possession, lean toward the feeling that "To permit the so-called 'lessor' (seller) to resume possession of the property, and declare all payments forfeited, when perhaps all but one may have been paid, is contrary to the fundamental principles observed in courts of equity."⁵³ The theory is probably the same one often given as reason for not allowing the seller to enforce further payment after retaking possession, namely, that such retaking amounts to a rescission of the contract.⁵⁴

3. TITLE, BUT NOT POSSESSION, ACQUIRED

When title has passed to the buyer, he has, of course, the concomitant right of immediate possession, unless his agreement with the seller provides otherwise, or unless the rights of the seller, as already set forth, give the seller a temporary right of possession. The seller has a lien until payment, unless he has given credit, and consequently the buyer can not enforce delivery of possession in such case until he has paid. On the other hand, if the

v. Oakes, 88 Me. 367; *Thulby v. Rainbow*, 93 Mich. 164, if buyer terminates contract by wrongful resale, demand must first be made by seller, to show a "disaffirmance" of the contract; *Sewing Mach. Co. v. Bothame*, 70 Mich. 443, but this was a hard case such as tend to shipwreck principles. Cf. *Tufts v. D'Arcambal*, 85 Mich. 185; *Colcord v. McDonald*, 128 Mass. 470.

Contra, *Hayes v. Jordan*, 85 Ga. 741; *Ketchum v. Cummings*, 53 Miss. 596.

53—*Puffer & Sons v. Lucas*, 112

N. C. 377; *Snook v. Reglan*, 89 Ga. 251, buyer may sue for money had and received, and recover sum paid less reasonable rent, etc.; *Foundry Co. v. Pascagoula Ice Co.*, 72 Miss. 608, "the reservation of the title is but as security for the purchase price, and if the property is recovered by the seller, he must deal with it as security, and with reference to the equitable right of the purchaser."

54—*Snook v. Raglan*, 89 Ga. 251; *Preston v. Whitney*, 23 Mich. 260. *Contra*, *Tufts v. D'Arcambal*, 85 Mich. 185.

seller has given credit, the buyer is entitled to possession, regardless of payment, if his credit is still good. As this right of possession of the buyer is merely the complement of the seller's right of possession after title has passed, and as that latter right has already been fully discussed,⁵⁵ it is unnecessary to discuss it further in this place.

Titular Action.—If the buyer does have the right of possession, he is invested with all the remedies such as replevin or trover, available to any owner who is kept from his lawful possession.*

This right of the buyer to have possession when he has acquired title exists, so far as practically enforceable, even in those cases where the sale has been of an undivided part of a larger mass. We have already seen that while there can be no title to unspecified property at all, the parties can pass a particular interest in some specific larger mass if they desire to do so, and that such a desire will be presumed in this country in case of sale of an unseparated part of a larger mass of fungible goods.⁵⁶ In such cases it is settled that the buyer, whether or not he be called owner, can maintain a possessory action of some sort against the seller.⁵⁷

The buyer who has acquired title, but not yet received possession, may lose his title and right to possession through the wrongful acts of the seller, in certain cases. This matter is discussed under the topic of rights of third persons.⁵⁸

Breach of Warranty.—We have seen that statements, either express or implied, in regard to the goods may

55—*Ante*, p. 115.

56—See *ante*, p. 63.

57—*Piazzek v. White*, 23 Kan. 621, replevin; *Halsey v. Simmonds*, 85 Ore. 324, 166 Pac. 944, replevin; *Seldomridge v. Bank*, 87 Neb. 531, 30 L. R. A. (n. s.) 337,

replevin; *Hurff v. Hires*, 11 Vroom. (N. J.) 581, trover; *Kimberly v. Patchin*, 19 N. Y. 330, trover; *Hall v. Boston & W. R. R.*, 14 Allen (Mass.) 439, conversion.

58—*Post*, p. 212.

*See Uniform Sales Act, Section 66.

be treated as part of the identifying description of the goods. In such case goods which do not conform to the statements are not the goods contracted for by the buyer and he need not take title to them unless he so chooses. These statements which serve to identify the goods contracted about are properly called "conditions."

—**What a Warranty Is.**—But the seller may make statements about the goods contracted for which, while they serve to characterize the goods, are not in fact related to the identity of the goods. For instance, the contract of sale may refer to some specific article whose identity is so fixed, not by description only, but by actual demonstration, that there can be no doubt as to just what tangible thing is concerned in the contract. But at the same time the seller may make a positive statement as to the character, or quality, or nature generally of the article. Such a statement, while in a sense descriptive of the article, does not in the least serve to identify the subject matter of the contract. In a sense there is a conflict of description—the oral description of characteristics of the article does not accord with the visual description by demonstration. But obviously, since it is a tangible, visible thing that is contracted about, rather than a mere conceptual thing, the demonstration should dominate the inconsistent oral statements, so far as concerns the identity of the thing to which the parties probably intended to transfer title.

These parts of descriptions which do not affect the real identity of the thing contracted about are called "warranties".⁵⁹ The name warranty is not limited to them, however. We have seen that if a buyer chooses to

59—"A warranty is an express or implied statement of something which a party understands shall be a part of a contract, and, though part of the contract, collateral to the express object of it."

Hurley-Mason Co. v. Stebbins, 104 Wash. 171, 140 Pac. 381.

"When the subject matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it

accept title to goods tendered, despite their non-conformity to the identifying description, or other conditions, he does not, in some states, waive all his rights growing out of the breach. He may still sue to recover damages resulting from the breach. These terms of the description, which could have been taken advantage of as conditions precedent, but which have been waived as such and exist only as a basis for recovery of damages are usually also called "warranties".⁶⁰ Sometimes they are called warranties before they have been waived as cause for refusing title. The name, therefore, while it may be a convenience in expression, indicates nothing as to the rights of the buyer, unless its particular meaning is expressly indicated. We shall use "warranty," hereafter, unless otherwise indicated, in its narrower sense of a descriptive statement concerning the goods, which could not be used, or has not been used, as part of the identifying description.^{61*}

shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition * * * because the existence of those qualities being part of the description of the thing sold becomes essential to its identity". *Pope v. Allis*, 115 U.S. 363; *United Iron Works Co. v. Henryetta Coal Co.*, 62 Okla. 99, 162 Pac. 209.

60—*Jones v. Witousek Co.*, 114 Ia. 14; *North Alaska Salmon Co. v. Hobbs*, 159 Cal. 380.

61—The term is also used, not infrequently, in reference to the contract, the promise, which is implied by law, as is hereafter discussed, from these statements. This is apt to cause especial difficulty because of the expressions "Implied warranty" and "Express warranty". The duplex usage of

"warranty" leaves it uncertain in such expressions whether an "express warranty" means an express promise or only an express statement from which the necessary promise will be implied. Conversely, "implied warranty" may mean an implied statement from which a promise will be implied in law, or it may mean a promise which is implied from an express statement. The expressions are more commonly used in reference to the statement, than to the promise, and will be here so used, unless otherwise indicated.

The term "warranty" is used of representations of fact or promises wholly unconnected with any sale in *Cameron v. Mount*, 68 Wis. 477; *Kuehn v. Wilson*, 13 Wis. 104, "warranty" that a horse would be cured by certain treatment.

*See Uniform Sales Act, Section 12.

—**Effect of Breach of Warranty.—Return of Goods.—**Restricting the term “warranty” to statements concerning quality, etc., of goods objectively identified in other ways, there is rather hopeless conflict as to whether property purchased can be returned for breach of warranty.

Many jurisdictions do allow the buyer to return the goods and recover the purchase price if already paid. In the often cited case of *Smith v. Hale*⁶² the facts were that Smith had sold a certain old buggy to Hale. At the time, some question about the strength of its springs having arisen, Smith “warranted” that they would bear up under a certain weight. Some months later a spring broke under a less weight. Hale thereafter tendered the buggy back to Smith and, on Smith’s refusal to accept it, entered Smith’s premises and took away the cow which he had given in exchange for the buggy. The court held that Hale was justified in taking the cow as he had a right to rescind the contract because of the broken spring.

The theory on which such rescission is allowed is absolutely indeterminate. Where parties have dealt about an article definitely identified by ocular demonstration, there would seem no possible doubt as to the specific object which the one has contracted to sell and the other to buy. Our whole theory of chattel property is, originally, objective. There is suggestion, however, in some cases that the subjective nature as well as the objective may have a part in identifying the object matter of the contract. In one case, for instance,⁶³ the plaintiff had agreed to buy and the defendant to sell a certain specific cow named “Rose 2nd of Aberlone.” Both parties supposed at the time that she was barren. Later it developed that she was fertile. The plaintiff was denied a recovery on various theories. One of them was that, the cow

62—158 Mass. 178.

63—*Sherwood v. Walker*, 66 Mich. 568.

being not barren, but fertile, she was not in fact the animal the defendant intended to sell.⁶⁴ On this theory, that every material statement as to the nature of the chattel sold is part of the identifying description, there is no such thing as a warranty. Every "warranty" becomes a condition.⁶⁵

Another theory is that although the parties have contracted concerning the specific property delivered and received, they have been mutually mistaken regarding its nature. Because of this mutual mistake a rescission will be allowed.⁶⁶

As a matter of fact the cases are probably *sui generis*. The whole modern idea of warranty is that a promise to indemnify is judicially "implied", or simply imposed, as the result of an express or implied statement about the goods. If the courts can imply a promise to *indemnify* the buyer, there is no reason why they can not imply a promise, or, what is the same thing in effect, impose a liability to take back the goods. At any rate, many courts allow the buyer to return the goods and recover his money.^{67*}

64—*Accord*, *Harvey v. Harris*, 112 Mass. 32; *Gardner v. Lane*, 12 Allen (Mass.) 39; *Chapman v. Cole*, 12 Gray (Mass.) 141.

65—This idea, that the concept in the minds of the parties is the real subject matter of their contract and their objective indication of some tangible chattel is only an incorrect attempt at describing it, is supported by some of the cases in criminal law. Larceny requires a wrongful *taking* of property. In *Regina v. Hehir*, [1895] 2 Ir. R. 709, the owner had deliberately given a certain tangible piece of paper to the defendant. Both parties thought this tangible thing was a £1 note. In fact it was a £10 note. On discovering the mistake the defendant

kept the note. The court held this keeping to be a taking on the theory that the owner had never given the £10 note to the defendant and the legal possession of it had continued always in the original owner. *Wolfstein v. People*, 6 Hun (N. Y.) 121.

On the other hand these cases are out of harmony with those in which a seller is held to have dealt with the physical personality before him regardless of the concept of personality which may have been in his mind. See *post*, p. 227.

66—*Newell v. Smith*, 53 Conn. 72; *Sherwood v. Walker*, 66 Mich. 568.

67—*Western Commercial Co. v. Western Wholesale Drug Co.*, 29

*See Uniform Sales Act, Section 69, (1), (2), (3), (4), (5).

On the other hand, many courts proceed on the theory that the parties have contracted concerning a specific chattel. If the seller has delivered that chattel he has performed his contract *to sell*, and his contract of warranty is not an agreement to take back the chattel, but only to pay damages resulting from the false statement.⁶⁸

—**Effect of Breach of Warranty.—Suit for Damages.**
—Whether the buyer can return the goods after breach of warranty, or not, if he does not do so he has a right of action against the seller for damages resulting from the incorrect statement.⁶⁹

Cal. Ap. Dec. 25, rescission of the contract was allowed even after a resale by the buyer; *Autofedan Hay-Press Co. v. Ward*, 89 Kan. 218; *North Alaska Salmon Co. v. Hobbs*, 159 Cal. 380, *dictum*; *Feeney & B. Co. v. Stone*, 89 Ore. 360, 171 Pac. 569, *dictum*; *Fulton Bank v. Mathers*, 183 Ia. 226, 166 N. W. 1050; *Hoyer v. Good*. — Ia. —, 161 N. W. 691, sale of a specific horse, warranted "sound"; *Jones v. Witousek Co.*, 114 Ia. 14; *International Harvester Co. v. Brown*, 182 Ky. 435, 206 S. W. 622, *dictum*; cf. *Lightburn v. Cooper*, 1 Dana (Ky.) 273; *Bryant v. Isburg*, 13 Gray (Mass.) 607, probably the leading case; *Frih & Co. v. Hollan*, 133 Ala. 583, *dictum*; *Campbell v. Thorp*, 36 Fed. 414, *dictum*; *Milliken v. Skillings*, 89 Me. 180.

Even in these states the right to rescind may be lost by long delay, *Autofedan Hay Press Co. v. Ward*, *supra*; *International Harvester Co. v. Brown*, *supra*; Cf. *Lightburn v. Cooper*, 1 Dana (Ky.) 273; *Storage Battery Co. v. Waterloo Ry. Co.*, 138 Ia. 369, *semble*; *Sturgis v. Whistler*, 145 Mo. Ap. 148.

Of course, an express provision in the contract, providing for rescission in case of breach of warranty will be given effect. *Dick v. Clark Jr. Elec. Co.*, 161 Ky. 622.

Also, such misrepresentation as amounts to actual fraud will justify a rescission on that ground, *Taylor v. First National Bank*, 25 Wy. 204, 167 Pac. 707.

68—*H. W. Williams Transportation Co. v. Darius Cole Co.*, 129 Mich. 209; *Worcester Mfg. Co. v. Waterbury Press Co.*, 73 Conn. 554; *Thornton v. Wynn*, 12 Wheat. 184; *Wright v. Davenport*, 44 Tex. 164; *Street v. Blay*, 2 B. & A. 456.

In the case of a conditional sale, if the chattel actually offered for the buyer's possession is not the chattel which the seller's contract bound him to present, the buyer can refuse to receive it and can sue for breach of the seller's promise. But if the chattel delivered to the buyer is in fact the one the seller contracted to deliver, although its characteristics are not what the buyer thought they would be, or if the buyer has consented to receive possession of some other chattel than the one specifically called for by

The theory on which this liability for false warranty is based is threefold.

The liability was originally considered as arising in - tort, and courts gave compensation for the damage caused by the seller's deceit.⁷¹ And this theory and form of action are not obsolete.⁷²

But, even in this form, it now differs from the ordinary action in tort for deceit or fraud, to the extent that

the contract, in such case he can not hold the seller for damage resulting from such difference until he has acquired the title. Thus in an action by the seller to recover possession of the chattel on the ground that the buyer has failed to pay as agreed the buyer can not defeat the action by a showing that his damages from non-conformity of the chattel to the warranty are in excess of the amount of the unpaid purchase price. The rule is that "a warranty is an incident only of consummated or completed sales and has no place as a contract, having present vitality and force, in an executory contract of sale."

Osborn v. Gantz, 60 N. Y. 540; English v. Hanford, 27 N. Y. S. 672, but an action for fraud or deceit may be maintained. Carpenter v. Chapman, 139 N. Y. S. 849, but damages for breach of warranty were allowed to be set-off against a claim for the purchase price; People v. Munson, 144 N. Y. S. 1077, *semble*; Stearns v. Drake, 24 R. I. 272; Blair v. A. Johnson & Sons, 111 Tenn. 111, at least not by way of set-off or recoupment in a seller's action of replevin.

69—Breach of warranty not waived by acceptance with knowledge thereof, Grisinger v. Hub-

bard, 21 Idaho 469; Gold Ridge Mining Co. v. Tallmadge, 44 Ore. 34; Frith & Co. v. Hollan, 133 Ala. 583; Wallack v. Clark & Son, — Okla. —, 174 Pac. 557, citing much authority; Alaska Salmon Co. v. Hobbs, 159 Cal. 380; Rice v. Friend Bros. Co., 179 Ia. 355, 161 N. W. 310, not lost because of attempted, but unsuccessful, rescission, nor because contract contained a provision permitting return of the goods; Boston Woven Hose Co. v. Kendall, 178 Mass. 232, not lost even though the defect was obvious on inspection; Regina Co. v. Gately Co., 157 N. Y. S. 746, "At common law an express warranty survives acceptance, but an implied warranty (condition?) does not."

71—Ames, History of Assumpsit, 2 Harvard Law Rev. 8. That form of action is used in Freeman v. Baker, 5 Car. & P. 475, and Pickering v. Dowson, 4 Taunt. 779, and the liability discussed on the theory of deceit.

72—West v. Emery, 17 Vt. 583; Johnson v. McDaniel, 15 Ark. 109; Ives v. Carter, 24 Conn. 392; Carter v. Glass, 44 Mich. 154; Dobell v. Stevens, 5 D. & Ry. 490; Langridge v. Levy, 2 M. & W. 519; Brown v. Edgington, 2 M. & G. 279.

in suing for deceit on a warranty it is not necessary to aver that the defendant knew the warranty to be false.⁷³

The seller's liability is also based on the theory of contract, the idea being that in making the statement the seller impliedly promises, on the same consideration that supports the promise to pass title, that if the statement be not true he will stand responsible in damages.⁷⁴

This theory, that the seller's liability is one *assumed* by him as a part of the contract, logically implies an intention on his part so to do; a conscious assumption of liability, even though such intention may necessarily have to be determined objectively. In the earlier cases it was held to be essential that this intent to assume the liability be truly evident from the circumstances. Some of them even indicate that some *express* indication of intention, such as the actual use of the word "warrant" in the contract, was necessary.⁷⁵ And there is still strong suggestion in some cases that, even though express intent need not appear, a real or at least a probable intent to assume the liability must be shown by the facts of the transaction.⁷⁶

The third theory gives mouth-honor to the idea of contract, but really simply *imposes* a liability on the seller

73—Williamson v. Allison, 2 East 446, cited in Carter v. Glass, 44 Mich. 154.

74—Baldwin v. Daniel, 69 Ga. 782; Congar v. Chamberlain, 14 Wis. 258. The American editor of Benjamin on Sales, 7th ed., p. 663, says, with the citation of considerable authority, "A warranty, therefore, being a contract, requires, like all other contracts a consideration to support it." Welshausen v. Parker Co., 83 Conn. 231, "without a contract there can be no warranty." In Jackson v. Watson & Sons [1909] 2 K. B. 193, the decision turned on the specific holding that the action

was in contract and not in tort. Roscorla v. Thomas, 3 Q. B. 234, holding "consideration" for the warranty to be essential.

75—Chandler v. Lopus, Cro. Jac. 4, as discussed by Mr. Ames in 2 Harvard Law Rev. 9; DeSewhanberg v. Buchanan, 5 Car. & P. 343.

76—Borrekin v. Bevan, 3 Rawle (Pa.) 23, 23 Am. Dec. 85; Wetherill v. Neilson, 20 Pa. 448, 59 Am. Dec. 741; Coats v. Hord, 29 Cal. Ap., 115, 154 Pac. 491; Henson v. King, 3 Jones (N. C.) 419; Hargous v. Stone, 5 N. Y. 73; Lichtenstein v. Rabolinski, 90 N. Y. S. 247, aff. 184 N. Y. 520.

as a matter of public policy. This liability has no relation whatever to any real intent of the seller. It is a liability which follows, as a matter of law, from his act of selling goods under certain circumstances. Theoretically there is a basic legal distinction between a liability arising from the intentional and conscious assumption of liability, even though such intent be objectively determined, and a liability which follows arbitrarily from certain acts of the seller, regardless of his probable intent. Theoretically they ought to be kept distinct in discussion. But actually the courts do not make the distinction. They use the phrase "liability on a warranty" to cover both reasons for the liability, and ordinarily disregard all reference to actual intent while at the same time talking of "implied warranties" as though a promise were really implied by the facts. In other words, "implied" *may* now mean implied by the facts, but usually means "imposed by law." The discussion therefore must follow this lead. The question of warranty or no warranty has long ceased to be, "Did the seller intend to warrant?" and has become, "Does the law impose a liability in this type of case?"⁷⁷

—What Are Warranties?—We may say generally, then, that a "warranty" is a statement by the seller in regard to the goods for which the courts will require him to make good in damages if it be not true.

Not all express statements concerning the goods are warranties—that is to say they do not create a legal liability. As we have already seen from the origin of the buyer's right, they must be acted upon by the buyer, either by giving consideration for them or by otherwise relying upon them to his detriment. Furthermore, mere

77—Carleton v. Lombard, Ayres & Co., 149 N. Y. 137; Cook v. Darling, 160 Mich. 475; McClure v. Central Trust Co., 165 N. Y. 108, 53 L. R. A. 153, 58 N. E. 777;

Greer v. Whalen, 125 Md. 273, use of word "warrant" unnecessary; and see authorities cited in the following notes.

statements of *opinion*, even though relied on by the buyer, do not create any liability on the part of the seller.^{78*}

Similarly, a statement which is obviously untrue and therefore could not have mislead the buyer does not create a liability on the seller for its untruth. On the theory that a warranty is a false statement of fact which gives rise to an action in tort for deceit, it is evident that the buyer would have no action, because he was not deceived. On the theory that a warranty is a statement from which the courts will infer a promise to answer for its inaccuracy, or because of which the courts will impose liability as a matter of public policy, it is equally evident that no promise could be *reasonably* implied and no liability reasonably imposed.* Of course, if there were not only an express statement, but also an express promise to make it good, the courts would probably enforce the contract even though the buyer did know it to be untrue. The damages, however, would probably be nominal only.

Statements which the courts will treat as warranties may cover any characteristic of the goods whatever. The seller need not make any representations about the goods, but if he does make representations, of any nature whatsoever, the courts may imply, or impose, therefrom a promise to make good its truth. Whether or not a seller did make the alleged representations is purely a question of fact, to be determined as such. If it is settled that he did make a certain representation, just what he meant by his words is a question of law.⁷⁹ That is to say, it is a

78—See authorities cited under *opinion* as a "condition," *ante*, p. 172 *Picard v. McCormick*, 11 Mich. 68, statement as to value *may* be a warranty. *Seixas v. Woods*, 2 Caines 48, 2 Am. Dec. 215.

Whether or not an express statement is a mere opinion is a question for the jury; *Kime v. Riddle*,

174 N. C. 442, 93 S. E. 946.

79—*Murchie v. Cornell*, 155 Mass. 60, use of term "ice" held to mean clear ice; *Sheffield Shingle Co. v. Edgecomb Mill Co.*, 52 Wash. 620, 101 Pac. 233, 35 L. R. A. (n. s.) 258, "Star A Star" shingles held to mean a certain quality.

*See Uniform Sales Act, Section 12.

question which the court will determine. But there is no rule, and can be none, for making the decision. Each case must be decided according to its own facts. And whether the statement is such that the courts will impose a liability to make it good is also a matter for the court itself.

—**Implied Warranties.**—It is not necessary that the seller make an express statement in order to be liable for the truth of a representation. Certain liability-creating representations may be implied by the circumstances of the transaction. Or, to put the rule in words more nearly in accord with the decisions, the law will sometimes impose a liability because of the circumstances of the transaction, regardless of any actual representation, express or tacit, on the part of the seller.

Thus the issue often is, does the law “imply a warranty”—or impose a liability—in the particular case.

There is no rule deducible from the cases by which this question can always be answered. Each case stands upon its own facts—which means that the answer rests in the particular judge’s own conclusions.⁸⁰ But there have developed certain broad rules, both positive and negative, as to when a liability will be imposed without an express representation by the seller.*

For example, one who sells under such circumstances that the buyer reasonably supposes him to be owner, will be held to have warranted title in himself. If title was not in him at the time of the sale he will be held liable to the buyer in damages, even though he made no statements whatever concerning the title.⁸¹ But, of course, if there is something about the transaction which

80—Whether there is such liability is a matter of law, for the court to decide, *Heilbut v. Buckleton*, 1913 A. C. 30.

81—*Gaylor v. Copes*, 16 Fed. 49; *Byrnside v. Burdett*, 15 W.

Va. 702; *Costigan v. Hawkins*, 22 Wis. 74; *Sherman v. The Champlain Trans. Co.*, 31 Vt. 162; *Boyd v. Whitfield*, 19 Ark. 447; *Linton v. Porter*, 31 Ill. 107; *Word v. Cavin*, 38 Tenn. 506.

*See Uniform Sales Act, Section 13, (1), (2), (3), (4), 14, 15, (1), (2), (3), (4), (5), (6), 16.

would indicate to a reasonable buyer that the seller was not selling as owner—as in case of sale by a sheriff, pawn-broker, administrator, etc.—he will not be liable to the buyer in damages unless he expressly promised to make good any lack of title in himself.⁸²

There is also a representation implied under some circumstances, that the goods as in other respects described shall be fit for the purpose for which the buyer intends to use them. In *Gold Ridge Mining Co. v. Tallmadge*,⁸³ the defendant had sold to the plaintiff “two hundred full miners’ inches of first or second water,” which he knew the plaintiff intended to use for mining purpose. The water as delivered was too full of debris to be usable. In deciding that the seller was liable for failure to perform his contract, the court said, “It is settled law that, where an article or commodity is to be made or supplied to a purchaser for a particular purpose known to the seller, there is an implied warranty that it shall be reasonably fit and suitable for the purpose intended.”⁸⁴

82—Thus, the fact that the chattel is not in the seller's possession has been held to negative an implied warranty of title, *Byrnside v. Burdett*, 15 W. Va. 702; *Costigan v. Hawkins*, 22 Wis. 74; *Budd v. Power & Co.*, 8 Mont. 380.

No warranty implied if circumstances reasonably negative it, *Cogar v. Burns Lumber Co.*, 46 W. Va. 256; *Johnson v. Laybourn*, 56 Minn. 332, judicial sale; *Storm v. Smith*, 43 Miss. 497; *Scranton v. Clark*, 39 N. Y. 220.

83—44 Ore. 34.

84—In the sale of a machine described as a “potato digger” there is an implied provision that it is capable of use for digging potatoes, *Hallock v. Cutler*, 71 Ill. Ap. 471; *Kennebrew v. Southern etc. Co.*, 106 Ala. 377; *Barry & Co. v. Usry*, 70 Ga. 711, “fertilizer” must

be capable of fertilizing; *Interstate Grocer Co. v. Bentley*, 214 Mass. 227, “sardines” must be marketable under that general name.

As illustrations: a seller of food manufactured by himself impliedly warrants it fit to eat, *Race v. Crum*, 222 N. Y. 410, 118 N. E. 852; *Doyle v. Fuerst*, 129 La. 838; *Barrington v. Hotel Astor*, 171 N. Y. S. 840. One who installed a wireless telegraph apparatus held to have impliedly warranted that its use would not infringe patents, *DeForest Co. v. Standard Oil Co.*, 238 Fed. 346; implied warranty that fruit trees sold by a nursery will grow, *Gresinger v. Hubbard*, 21 Ida. 469; that water sold for mining purposes will be sufficiently clear of sediment for use, *Gold Ridge Mining Co. v.*

But no such representation will be implied, of course, if the circumstances are not such as to justify it. If the seller does not know of the purpose for which the thing described is to be used, no requisite of fitness beyond what normally appertains to an article so described will be implied. To quote, as illustration, from *Talbot Paving Co. v. Gorman*,⁸⁵ "The exact point made by the plaintiff appears to be that, inasmuch as the defendant (the seller) knew what the specifications were, the law implied a warranty of fitness. A pertinent inquiry is, 'A fitness for what?' Was it fitness for the paving jobs that the plaintiff had on hand? If this be claimed, it is a sufficient answer to say that the evidence fails to disclose that the defendant knew what jobs plaintiff had."⁸⁶

Neither will there be implied anything that the seller could not reasonably be supposed to have known concerning the chattel itself. He impliedly undertakes to furnish what is reasonable under the circumstances, which is a chattel, such as described in the contract, that will, in addition to that express description, suit the buyer's known purpose of use, so far as the seller ought reasonably to know its characteristics outside of the express description. But he does not *impliedly* agree that, if it conforms to the express description, it shall be free from defects of which he could not reasonably know.^{87*}

Nor will the law imply a representation that the described goods will be of a quality, or of a fitness for

Tallmadge, 44 Ore. 34; municipality in furnishing water impliedly warrants that it is free from disease germs, *Canavan v. City of Mechanicsville*, 177 N. Y. S. 808; reversed, N. Y. 1920, 128 N. E. 885.

85—103 Mich. 403, 406.

86—*Day v. Mapes-Reeve Cons. Co.*, 174 Mass. 412.

*See Uniform Sales Act, Section 13, (1), (2), (3), (4), 14, 15, (1), (2), (3), (4), (5), (6), 16,

87—*Bragg v. Morrill*, 49 Vt. 45; *Seixas v. Woods*, 2 Caines 48, 2 Am. Dec. 215; *Swett v. Colgate*, 20 Johns. (N. Y.) 196, 11 Am. Dec. 266; *Ryan v. Ulmer* 108 Pa. 332, 56 Am. Rep. 210; *Julian v. Laubengerger*, 16 Misc. (N. Y.) 646; *Jones v. Just*, L. R. 3 Q. B. 197.

See authorities *post*.

particular purpose, inconsistent with the known, or the normal, characteristics of goods conforming to the express description. For instance, if a buyer orders "a driving belt with cemented laps, instead of riveted ones, to run an elevator hoist" he can not hold the seller liable if a belt with cemented laps is not suitable for that purpose.⁸⁸ There is, ordinarily, no duty on the part of the seller to point out inconsistency between the express description and the purpose, and his performance according to the description is sufficient. In *Chanter v. Hopkins*,⁸⁹ the defendant had ordered of plaintiff one of his "patent furnaces," stating in the order that it was to be used in a certain way. Plaintiff's patent furnaces were all of a standard and all had the same characteristics. The one sent, although of this known standard, was not fit for the defendant's purpose. It was held, nevertheless, that the plaintiff had fulfilled the agreement. Lord Abinger said, "The question is, whether or no the order has not been complied with in its terms. What is the order? It is an order for one of those engines of which the plaintiff was known to be the patentee; he was not obliged to know the object or use to which the defendant meant to apply it; and it is admitted there is no fraud. If, when the plaintiff received such an order, he had known it could not be so applied, and felt that the defendant was under some misapprehension on the subject, and that he was buying a thing on the supposition that he could apply it to that use, when the plaintiff very well knew he could not, in that case it might affect the contract on the ground of the suppression of a material fact; that might be a question for the jury. Or if the terms of the contract were proposed by the plaintiff himself, such as, 'I will send you one of my smoke-consuming furnaces, which shall suit your brewery;' in such case that would be a warranty that it would suit a brewery. But

88—*Gregg v. Page Belting Co.*, 89—4 M. & W. 399.
69 N. H. 247.

in this case no fraud whatever is suggested; and the case is that of an order for the purchase of a specific chattel, which the buyer himself describes, believing, indeed, that it will answer a particular purpose to which he means to put it; but if it does not, he is not the less on that account bound to pay for it.'⁹⁰

This is only one phase of the general rule that *no representation of fact*, and its attendant liability, *will be implied* by the courts when such an implication would be *inconsistent with the express statements*, or with the express terms of the contract. *A fortiori*, if the seller definitely states that there is no liability dependent on the statements he makes, and that no other representations are to be implied, the courts will not attach a liability to such statements.^{91*}

But, although the courts will not unreasonably imply statements inconsistent with the express ones, *if there are in fact, or by reasonable implication, incongruous statements*, the courts may impose a liability for the incorrect one. In *Drummond v. Van Ingen*,⁹² for instance, the seller agreed to furnish goods exactly like a certain sample and represented that they would be suitable for a certain pur-

90—*Gregg v. Page Belting Co.*, 69 N. H. 247; *Titley v. Enterprise Stone Co.*, 127 Ill. 457, an agreement for "rubble stone from seller's quarry" carries no implication of special characteristics; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120; *Wilson v. Lawrence*, 139 Mass. 318; *Cafre v. Lockwood*, 47 N. Y. S. 916; *Fairbanks Morse Co. v. Baskett*, 98 Mo. Ap. 53; *Warren Glass Works v. Keystone Co.*, 65 Md. 547; *Port Carbon Iron Co. v. Groves*, 68 Pa. 149; *Dounce v. Dow*, 64 N. Y. 412; *Wheaton etc. Co. v. Noye etc. Co.*, 66 Minn. 156; *Wisconsin Red Brick Co. v. Hood*, 67 Minn. 329; *Basin & Co.*

v. Conley, 58 Md. 59.

But a fitness for the purpose *may* be a part of the total description even though inconsistent with other parts. That is to say, the foregoing rule is not absolutely correct, nor meticulously adhered to. See following notes for citations.

91—*Hartin v. Pelt*, 76 Ark. 177; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Lynch v. Curfman*, 65 Minn. 170; *Wood v. Ross (Tex.)*, 26 S. W. 148; *M'Lean v. Green*, 2 McM. (S. C.) 17; *Burnett v. Hensley*, 118 Ia. 575.

92—12 App. Cas. 284.

*See Uniform Sales Act, Section 71.

pose. The goods when furnished were in fact exactly like the sample, but they were not fit for the purpose. The representation that they would be fit for the purpose intended was necessarily inconsistent with the promise that they should be exactly like the sample. The court held the former representation to be more important than the literal form of the latter promise and imposed on the seller a liability to make good his representation of fitness.⁹³ There is no rule by which it can absolutely be determined how a court will solve any possible inconsistency of this kind.

In summarization, then, the courts will usually imply a warranty that goods are fit for the purpose for which the buyer intends them, whether that purpose be re-sale, consumption, or anything else. But they will not imply such warranty unless the seller may reasonably be supposed to know that purpose. And they will not imply such a warranty if it is expressly negatived by the seller, nor if to do so would be inconsistent with the other parts of the description.

Neither will the courts imply a warranty unless the seller can reasonably be supposed to know more about the goods sold than the buyer does. A manufacturer, for instance, may know more about the chattel sold than does the buyer, but a retail seller has not necessarily any more exact knowledge than the buyer. Hence a seller is not usually responsible, *by mere implication*, for hidden defects in an article of which he is not the manufacturer, or grower, or packer, or otherwise so concerned as reasonably to have opportunity for greater knowledge than the buyer has.⁹⁴

93—Acad., West End Mfg. Co. v. Warren Co., 198 Mass. 320; Lissberger v. Kellogg, 78 N. J. L. 86.

94—Zielinski v. Potter, — Mich. —, L. R. A. 1917 D 822, no warranty of fitness implied in sale of animal to be slaughtered to ex-

perienced butcher, who inspects it; National Cotton Oil Co. v. Young, 74 Ark. 144, cattle feed not warranted free from accidental defects; Lukens v. Freund, 27 Kan. 664, *id.*; Cf. Houk v. Berg, Tex. —, 105 S. W. 1176. Wisconsin Brick Co. v. Hood, 67 Minn. 329;

—**Implied Warranties in Sales of Food.**—In case of a sale of food there is a tendency to depart from this logical position that no warranty will be implied unless the seller had more reason than the buyer to know about the goods. Thus, in *Chapman v. Roggenkamp*⁹⁵ the plaintiff had bought a can of peas from the defendant and had been made violently sick from some toxin in them. She sued for damages on an implied warranty that they were wholesome. The defendant was only a retailer and had not himself packed the peas. He had apparently every reason to suppose that they were perfectly wholesome. His counsel “argued that where a person purchases from such a dealer articles of food in cans for immediate consumption, the buyer, from the nature of the transaction, must know that the seller has no greater knowledge as to the condition of the articles than the buyer has, and, hence, does not rely upon the seller’s superior knowledge, and that, therefore, there is no implied warranty of the wholesomeness of said articles.” Despite the obvious forcefulness of this argument the court decided that the defendant was liable on an implied warranty, on the principle that “public safety demands that, in all sales of provisions for domestic use by a retail dealer, there should be an implied warranty.”⁹⁶

There is strong dissent from this imposition of arbitrary liability in cases where the seller has no more opportunity to learn the truth than the buyer has.⁹⁷

Swank v. Battaglia, 84 Ore. 159, L. R. A. 1917 F 469, sale of apparently sound, but really worthless potatoes by one dealer to another; *Thompson v. Libby*, 35 Minn. 443, fitness for purpose; *Fairbanks Co. v. Holt*, 79 Wash. 361, 140 Pac. 394, sale of second hand goods; *White v. Oakes*, 88 Me. 367, dealer in folding beds not liable for tendency of bed sold to close up unexpectedly.

The manufacturer of an article,

however, is legally presumed to know its character, *Reynolds v. Gen'l Elec. Co.*, 141 Fed. 551.

95—182 Ill. Ap. 117.

96—Accd., *Ward v. Great Atlantic & Pac. Tea Co.*, 231 Mass. 90, 120 N. E. 225.

Such liability is imposed by statute in Pennsylvania. *Weiss v. Swift & Co.*, 36 Pa. Sup. Ct. 376.

97—*Julian v. Laubenberg*, 16 Misc. (N. Y.) 646, the doctrine of implied warranty “proceeds

But where the food is not in cans, or otherwise concealed, the weight of authority makes a dealer liable on implied warranty of wholesomeness, on the ground that as a dealer his knowledge of its condition is superior to that of the buyer.⁹⁸ But even this liability does not extend to sellers who are not regular dealers in the particular type of article.⁹⁹ Nor does it arise in cases where the buyer is fully as conversant with the nature of the article as is the seller.

—**Time of Making the Warranty.**—It is not essential to the seller's liability that the statements shall have been immediately connected with the other transactions of the sale. It is sufficient if they were intended to be a part of the transaction. Thus in one case¹⁰⁰ the defendant was accustomed to sell fiberoid to the plaintiff from time to time. In March the plaintiff complained that the goods had too great tendency to catch fire. The defendant replied that in the future it would be all right. The following October, without any further representa-

upon the assumption that the vendor has some means of knowledge, opportunities for inspection, or sources of information with regard to the article which are not accessible or are unknown to the purchaser." The dealer has no better way of knowing what is in the cans than has the buyer. *Bigelow v. Maine Cent. R. R.*, 110 Me. 105.

98—"The early rules of law were formulated upon the theory that the provision dealer and the victualer, having an opportunity to observe and inspect the appearance and quality of the food products they offered to the public, were, accordingly, charged with knowledge of their imperfections;" *Bigelow v. Maine Cent. R. R. Co.*, 110 Me. 105; citing *Winslow v.*

Lombard, 18 Pick. (Mass.) 57; *Bishop v. Webber*, 139 Mass. 411. In *Farrell v. The Manhattan Market Co.*, 198 Mass. 271, this was confined to articles selected from his general stock by the dealer himself, as distinct from those picked out by the customer; *Wiedeman v. Keller*, 171 Ill. 93; *Rinaldi v. Mohican Co.*, 157 N. Y. S. 561, sale of meat stamped wholesome by government inspectors.

The packer impliedly warrants what he sells to the dealer, *Copas v. Provision Co.*, 73 Mich. 541.

99—*Giroux v. Steadman*, 145 Mass. 439, sale of hogs by a farmer.

100—*Leavitt v. Fiberoid Co.*, 196 Mass. 440.

tions in the meantime, the plaintiff bought more fiberoid which did catch fire too readily. He sued on the express warranty that it would be all right. The court sustained the suit, saying, "this was a continuing offer of guarantee. * * * It is not necessary that the giving of the warranty should be simultaneous with the sale. It is enough if it is made under such circumstances as to warrant the inference that it enters into the contract as finally made."¹⁰¹

—**Measure of Damages.**—The buyer may recover compensation for damage resulting from the false statements, either by setting off the amount against the pur-

101—Another court, *Bowen v. Zaccanti*, 203 Mo. 208, 208, S. W. 277, has gone so far as to hold that a statement made after the contract had been completely entered into creates a liability as a warranty, if it was made before the money had been paid and before title had passed. In this case, of course, there could have been no "consideration" for the warranty, the contract having been admittedly complete before the statement was made. Neither could it well be said that the buyer had been deceived to his damage, he having already fully bound himself to take the goods and pay the price by a contract quite free from fraud or deceit. The so-called warranty was clearly no part of the contract of sale. There is really no theory on which this particular decision can be supported. The case to which the court refers as original authority, namely *McGaughey v. Richardson*, 148 Mass. 608, does not in fact support it, as the warranty therein considered had been made orally

at the time of the contract of sale and as a part of it, and merely put into writing thereafter.

To the effect that if otherwise a part of the contract of sale, representations need not be coincident with the rest of the transaction, see *Powers v. Briggs*, 139 Mich. 664. In *Way v. Martin*, 140 Pa. 499, it was left to the jury to determine whether statements made before the final contract was entered into were intended to be a part of that contract; *Crossman v. Johnson*, 63 Vt. 333.

But compare *Rausberger v. Ing*, 55 Mo. Ap. 621.

The statement must be a part of the contract transaction, *Hopkins v. Tanqueray*, 15 Com. B. 130. This matter is confused through failure to distinguish whether the seller must have intended it as a term in the contract, which is the basis of decision in the case cited, and in *Zimmerman v. Morrow*, 28 Minn. 367, or whether it is sufficient that the buyer was justified in supposing it to have been so intended.

chase price, or, if he has already paid, by a separate action for damages.¹⁰²

The usual rules for fixing the damages apply in this case. The elements considered must vary with the circumstances of each case. But it may be said as a broad, general rule, that the amount of damage is the difference between the value of the goods as they actually were when the breach was discovered, and the value they would have had if the representations had been true.^{103*}

This comparison of values is not always practically applied, and, even if a comparison could be made, it would limit the damages recoverable at most to the difference between the proper goods and worthless goods. It would not cover collateral damage at all. But, in fact, when the difference in values is not a fair or practical measure of the damage it is not the measure used. The broader rule is, that "upon any breach of contract, whether of warranty or otherwise, the defendant is liable for whatever damages follow as a natural consequence and the proximate result of his conduct, or which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of a breach of it."¹⁰⁴

102—But he can not sue for damage before the seller has either passed the title or broken the contract of sale. *Bunday v. Columbus Machine Co.*, 143 Mich. 10; *Moneyweight Scale Co. v. David*, 180 Mich. 8; *G. B. Shearer Co. v. Kakoulis*, 144 N. Y. S. 1077, a conditional buyer can not set up breach of warranty in defense of an action for an installment due. And see *ante* p. 184.

103—*Deutsch v. Pratt*, 149 Mass. 415; *Scranton v. Mechanics Trading Co.*, 37 Conn. 130; Cal. Civil Code, sec. 3313, declares damages for breach of war-

ranty to be the difference between the value as it should have been and as it actually was "at the time to which the warranty referred." This was interpreted, in *Shearer v. Park Nursery Co.*, 103 Cal. 415, to mean the time at which the breach is, or should be, discovered.

104—*Leavitt v. Fiberoid Co.*, 196 Mass. 440, 445, citing many authorities. In *Boston Woven Hose Co. v. Kendall*, 178 Mass. 232, the buyer was allowed to recover amounts which he had been compelled to pay to his own employees who had been injured

*See Uniform Sales Act, Section 69, (6), (7), 70.

—**Who May Sue.**—The warranty is personal to the buyer. That is to say, it does not run with the ownership of the chattel, and the second buyer can not sue the original warrantor for the breach.¹⁰⁵

through defects in the warranted chattel. In *Weston v. B. & M. R. R. Co.*, 190 Mass. 298, the loss of probable profits was allowed as damage.

For breach of warranty of seeds, the buyer was allowed the difference between the value of the crop actually produced and the value of such a crop as would ordinarily have been produced had the seeds been as warranted, *Ford v. Farmer's Exch.*, 136 Tenn. 287, 189 S. W. 368; *Passenger v. Thorburn*, 35 Barb. (N. Y.) 17; *Schutt v. Baker*, 9 Hun. (N. Y.) 536; *Flick v. Wetherbee*, 20 Wis. 392. Other cases have allowed the cost of preparing the soil and the loss of use of the land to be added to the cost price of the seed as damage, *Reiger v. Worth*, 127 N. C. 230; *Butler v. Moore*, 68 Ga. 780; *Ferris v. Comstock*, 33 Conn. 513; *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708; *Phelps v. Elyria Milling Co.*, 12 Ohio Dec. 695.

In *Campbell Co. v. Thorp*, 36 Fed. 414, it was said that the monetary difference between a chattel warranted "satisfactory" and one which was "reasonably good" could not be estimated.

For breach of warranty of title, the purchase price with interest and possibly the cost of attempting to defend title, is allowed. *Smith v. Williams*, 117 Ga. 783.

105—*Thisler v. Keith*, 7 Kan. Ap. 363; *Smith v. Williams*, 117 Ga. 782; *Nelson v. Armour Packing Co.*, 76 Ark. 352, 6 Ann. Cas. 237; *Tomlinson v. Armour Pack-*

ing Co., 75 N. J. L. 748; *Roberts v. Anheuser Busch Assn.*, 211 Mass. 449; *Prater v. Campbell*, 110 Ky. 23; *Crigger v. Coca Cola Bot. Wks.*, 132 Tenn. 545.

Nor can one not in privity take advantage of it, *Gearing v. Berkson*, 223 Mass. 257.

There is a growing tendency of late to hold that the warranty does run with the ownership of the goods in cases of the sale of food. If the warrantor's liability were truly one of contract these decisions would be utterly illogical, but since in reality the liability has become one imposed by law, regardless of intent, it is merely a question of how far the policy of the courts will go. Held that the liability of the manufacturer-seller does run with the ownership, *Mazetti v. Armour & Co.*, 75 Wash. 622, 48 L. R. A. (n. s.) 213; *Ward v. Morehead City Sea Food Co.*, 171 N. C. 33; *Catani v. Swift & Co.*, 251 Pa. 52; *Davis v. Van Camp Packing Co.*, — Ia., —, 176 N. W. 382; dissenting opinion in *Drury v. Armour & Co.*, 140 Ark. 371, 216 S. W. 40; but cf. *Welshausen v. Parker Co.*, 83 Conn. 231, "There must have been evidence of a contract between the parties, for without a contract there could be no warranty."

Attention is called to the fact that the judicial tendency to hold a manufacturer of food absolutely responsible for its wholesomeness is not restricted to the theory of implied warranty, but can also be taken advantage of by an action

in tort, for negligence. There is marked tendency in such cases to hold the manufacturer liable as insurer, on the *fiction* of negligence whether there is any evidence of negligence in fact or not. On this theory, suit can be maintained by any one who is injured by the unwholesome product. See

18 Mich. Law Rev. 316; 18 Mich. Law Rev. 436.

But even in such cases, many courts hold to the rule that a third person injured by unwholesome food sold can not recover on warranty—as distinct from tort for negligence—unless the buyer was the plaintiff's agent. *Gearing v. Berkson*, 223 Mass. 257.

CHAPTER V

REMEDIES AND RIGHTS OF THIRD PERSONS

In discussing the rights of buyers and sellers we have heretofore assumed that the seller was the absolute owner of the goods whose title he had undertaken to transfer. But it occasionally happens that one sells, or attempts to sell, goods of which he is not owner, or which he otherwise has no legal power to transfer. In such case the rights of his buyer may be subject to those of someone who was not a party to the contract of sale. It is the rights of such persons, between whom there is no contract relation, that are now to be discussed.

1. PURCHASERS FROM A PERSON IN POSSESSION, BUT WITHOUT TITLE

The foundation on which all these rights are based is the general principle that one can not be deprived of ownership without his consent. A seller, therefore, who has no title himself can not pass a title to the buyer so as to affect the rights of the real owner—except as the broad principle has been modified in one respect or another.

In General.—The commonest case in which the question arises, is where one buys for value from another who is in possession of the goods and whom the buyer believes in good faith to be the owner, but who in fact is not the owner. Even in such case, although the seller may have been lawfully in possession, though there may have been nothing peculiar to warn the buyer that he was not owner, and though the buyer may have parted with money which he can not practically recover, nevertheless the buyer's

rights in the property are subordinate to those of the real owner, if the sale was made without the latter's consent.*

Thus, as illustration, A employed B to buy seed for him and in his, A's, name to *lend* it to farmers. B was to pay for the seed with A's money, and it was definitely understood between them that it was to be A's property as purchased. B, while in possession of some of this seed, sold it to C. The latter knew nothing of the agreement between A and B, and honestly assumed from B's possession that he was the owner. A sued C in trover for the seed and got judgment, the court holding that B's mere possession of the seed with A's consent was not enough to preclude A from setting up his title.¹

Even though the person in possession has actual authority to sell to some particular person, it has been

1—*Gilman Oil Co. v. Norton*, 89 Ill. 434, citing other authority; *Edwards v. Dooley*, 120 N. Y. 540; *Oliver Ditson Co. v. Bates*, 181 Mass. 455, plaintiff, a wholesale dealer in pianos, *leased* an instrument to B, "a dealer in musical instruments." B, while in possession, sold to defendant who supposed him to be owner, or at least to have the right to sell. Plaintiff sued for conversion and it was held that the written lease rebutted any pretense of agency on B's part and that the buyer was not otherwise protected. *Milner & K. Co. v. DeLoach Mill Co.*, 139 Ala. 645, 101 Am. St. 63, purchaser at sheriff's sale of goods in judgment debtor's possession not protected; *Tobin v. Portland Mills Co.*, 41 Ore. 269, owners in common of grain stored in warehouse allowed to recover from purchas-

er from warehouseman; *Tuttle v. White*, 46 Mich. 485; *Ladd v. Brewer*, 17 Kan. 204, buyer of horse from one in charge of livery stable not protected; *Klein v. Siebold*, 89 Ill. 540, sale, while in possession, by husband of owner; *Baker v. Taylor*, 54 Minn. 71; *McGinley v. Betchel*, 4 Neb. Un., 552, 95 N. W. 32; *Staples v. Bradbury*, 8 Me. 181, 23 Am. Dec. 494; *Thacher v. Moors*, 134 Mass. 156; *Collins v. Ralli*, 20 Hun. (N. Y.) 246; *Albany Warehouse Co. v. Fiske Cotton Co.*, 16 Ala. Ap. 256, 76 So. 988; *Prentice v. Page*, 164 Mass. 276; *Velsian v. Lewis*, 15 Ore. 539, 3 Am. St. Rep. 184, citing much authority; *A. F. T. Corp. v. Pathe Exch.*, 172 N. Y. S. 364, an extreme case; *Barrow v. Brent*, 202 Ala. 650, 81 So. 669; *Yates v. Russell*, 20 Ariz. 338, 180 Pac. 910; *O'Neil v. Thompson*, 152 Mich. 396.

*See Uniform Sales Act, Section 23, (1), (2), 76, "Goods".

held that another person who *lends* money on his apparent ownership is not protected.²

Even the fact that the person in possession has authority to find customers for the goods does not protect one who buys from him, believing he has power to sell.³

Not even when the character of the goods has been changed by the possessor can he pass title to a purchaser, unless, of course, his change in the goods has been such as, by rules of title, vests title in himself, regardless of the owner's consent.⁴

The so-called rule, that "where one of two innocent parties must suffer from the fraud of a third, the loss will fall on him whose fault enabled the fraud to be committed", is often invoked in these cases. But, as a rule for decision, it is meaningless, since it still leaves to be decided the question as to whose fault enabled the fraud to be perpetrated. Was it the owner's fault in entrusting the goods to the one who fraudulently disposed of them? Or was it the fault of the buyer in purchasing from one of whose title he was not absolutely sure? In answering this, the issue of title is decided at once without help from the "rule." But, so far as the "rule" is concerned, the cases say specifically that the fault is the *buyer's*, and therefore, according to the "rule," the loss must fall on him.⁵

2—Prentice v. Page, 164 Mass. 276.

3—Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332, even though the person in possession was a trader in such goods. Thacher v. Moors, 134 Mass. 156.

4—Strubbee v. Trustees, 78 Ky. 481.

5—Velsian v. Lewis, 15 Ore. 539, 3 Am. St. Rep. 184, "at first blush, it may seem strange that one who takes possession of goods or chattels under a contract of

purchase, from one who has no right to sell, should be treated as a wrong doer; but the explanation of the principle lies in the common-law maxim *caveat emptor*, which applies to the transfer of personal property. *It is the buyer's own fault*, if he is so negligent as not to ascertain the right of the vendor to sell, and he can not successfully invoke his *bona fides* to protect himself from liability to the true owner, who can only be divested of his rights or

An infinitely more usable test, or rule, is the one that *where two persons have each an equity in the goods—as sharply distinct from an equity against some person—that one will prevail who has also the legal title*. If it be assumed that one who has been wrongfully, e. g. fraudulently, or by an act of conversion, deprived of possession has an equity in the goods, that one who has paid money, or otherwise acted, in reliance on the payee's *possession* of goods has also an equity in them and that one who relied on another person, but not on his possession, has not an equity in the goods, it will be found that courts give judgment with great consistency in favor of the person who, coupled with an equity, has the legal title, general or special. This principle is not often stated, at least in this particular connection, but it is undoubtedly the most positively applicable rule.

Of course, if the true owner has given the person in possession *authority* to sell, a sale by him, in accord with that authority, will vest the rights of ownership in the buyer. This is merely the established principle of agency applied to the specific case of a sale. In such case the title passes directly from the original owner and not from the first buyer. It passes not because the seller had title, but because he was agent of the real owner to pass it.^{5a}

Furthermore, the authority to sell need not be expressly given—it may be shown by the implication of all the circumstances. The leading case on this point is *Pickering v. Busk*.⁶ The plaintiff, who had bought certain hemp through one Swallow, had the warehouseman

title to his property by his own act, or by the operation of law. *Every person is bound at his peril to ascertain in whom the real title to property is vested, and however much diligence he may exert to that end, he must abide by the consequences of any mistake.*" (Author's italics.) *Ketchum v.*

Brennan, 53 Miss. 596, "A buyer may trust to appearances; but if they prove false and delusive, he takes the risk, and must abide the result." *Johnson v. Credit Lyonnais Co.*, 3 C. P. Div. 32.

5a—*Robinson's Appeal*, 63 Conn. 290.

6—15 East 38.

who stored it transfer it on his books to the name of Swallow. Another parcel was carried on the books in both of their names. Swallow afterwards sold this hemp to the defendants, who supposed him to be the owner. The court held title to be in the defendant. Lord Ellenborough put it on the ground that Swallow had an ostensible authority to sell, but without saying just what demonstrated that ostensible authority. The real basis of the decision, however, is that Swallow had a *real*, though implied rather than express, authority to sell. Justice LeBlanc said, "the mere possession of personal property does not convey a title to dispose of it. * * * Now for what purpose could the plaintiff leave it in the name of Swallow, but that Swallow might dispose of it in his ordinary business as broker * * *." And Justice Bayley said, "if a person puts goods into the custody of another, whose common business it is to sell, *without limiting his authority* (author's italics), he thereby confers an *implied* authority upon him to sell them."

As we have seen, and as Justice LeBlanc said, merely putting one in possession of goods does not imply in him any authority to sell them. There must be something more in the facts. *Pickering v. Busk* indicates that putting them in the possession of one whose common business it is to sell such goods, does create such an implication. But even in such case there will be no authority implied, as Justice Bayley said, if other facts negative it.⁷ And the fact that the person in possession has also some other business than that of selling, by virtue of which the goods might have been entrusted to him, is enough, as the authorities cited above show, to negative an inference of agency.

Just what other combination of circumstances will imply, in the person entrusted with possession, an agency

7—*Levi v. Booth*, 58 Md. 305;
Bank v. Johnson, 104 Wash. 550, 177
 Pac. 340, possession of automobile
 by corporation engaged generally

in selling automobiles held *not* to
 give them apparent authority to
 sell.

to sell, can be determined only from particular precedents. It is a matter of individual conclusion in each case and can not be determined by rule.⁸

Pledges.—Even when the person in possession does have authority to sell, express or implied from the circumstances, it does not follow that he has also implied authority to pledge the goods.^{9*}

When Seller Has a Right to Acquire Title.—That the innocent purchaser will not be protected against the real owner is true at Common Law¹⁰ even when the person in possession has a contractual right to *acquire* the title. That is to say, one who has possession of goods under a “conditional sale” contract, whereby he is to acquire title upon performance of a stipulated condition, can not pass a title, even to a *bona fide* purchaser for value, before performance of the condition.¹¹

8—“The implied authority must arise from the natural and obvious interpretation of facts according to the habits and usages of business.” *Saltus v. Everett*, 20 Wend. (N. Y.) 267; *Lewenberg v. Hayes*, 91 Me. 104, 94 Am. St. Rep. 215; *Ladd v. Brewer*, 17 Kan. 204; *Calais Steamboat Co. v. Scudder*, 2 Black, (67 U. S.) 372; *Smith v. Clews*, 105 N. Y. 283, acquiescence in prior sales by the one entrusted with possession held sufficient; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; *Cowdry v. Vandenburg*, 101 U. S. 572, indorsing a non-negotiable instrument in blank held enough; *Winchester Wagon Works v. Carmen*, 109 Ind. 31, 58

Am. Rep. 382, person in possession was a dealer; *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Quinn v. Davis*, 78 Pa. 15.

9—*Paterson v. Tash*, 2 Strange 1178; *Commercial Bank of Selma v. Hurt*, 99 Ala. 130, 12 So. 568; *Prentice v. Page*, 164 Mass. 276.

10—All of these rules have been more or less modified by statutes. But it seems desirable to discuss the Common Law as a whole, without interruptive digressions concerning statutory change, in order to give a clear background against which to observe the various statutes.

11—*Lorain Steel Co. v. Norfolk R. R. Co.*, 187 Mass. 500; *Payne v. June*, 92 Ind. 252; *Lippincott v.*

*This rule has been changed by statute in a number of states, although not by the Uniform Sales Act. These provide, in general, that if an agent has been entrusted with goods, or documents of title, with authority to sell them, a pledge by him may also be effective. The provisions vary, however.

In a few jurisdictions, however, this does not hold and one in possession under a contract of conditional sale can sell in such a way that his buyer will be protected against the original owner.¹² This doctrine, embodied in statutes in many other states, may be economically wise, but it is inconsistent with kindred rules. Either it is illogical, or they are. When the seller is in possession, his *appearance* of ownership is the same whether he acquired that possession by contract to buy, by hire, by loan, or by theft. If the buyer knows how his seller got possession, he knows that his seller has no title. If the buyer does not know how his seller got possession, then the manner of possession can not affect the seller's appearance of title, or right to sell. The doctrine of these decisions, which protect the innocent purchaser when the seller is in possession under a conditional sale contract, can not be estopped, for the same reasons would apply to other cases of possession, in which the innocent buyer is not protected. The only other explanation is to say that the "conditional buyer" really has title and that what the seller by conditional sale really reserves is something less than title. This finds express support in some cases which allow suit for the purchase price after the conditional seller has retaken possession on account of the buyer's default. But other cases are

Rich, 22 Utah 196; Albany Warehouse Co. v. Fisk Cotton Co., 16 Ala. Ap. 256, 76 So. 988, person in possession would ordinarily have had title save for statute which declared that title should not pass till payment, but buyer from him was not protected; Riley v. Dillon, 148 Ala. 283, *dictum*; Harkness v. Russell, 118 U. S. 663, citing much authority; Ballard v. Burgett, 40 N. Y. 314, citing authority and settling doubt in New York; Menke v. First Natl. Bank., — Tex.—, 206 S. W. 693; Ocean S. S. Co. v. So. States Naval Stores Co., 145 Ga. 798; Palmer v. Howard, 72 Cal.

293; Studebaker Bros. v. Mau, 13 Wyom. 358; Freed Furniture Co. v. Sorenson, 28 Utah 419; Leighton v. Stevens, 22 Me. 252, attaching creditors.

12—Coors v. Reagan, 44 Colo. 126; Lincoln v. Guynn, 68 Md. 299, 6 Am. St. Rep. 446; Mertz v. Stewart, 211 Ill. Ap. 508, "possession of personalty is prima facie evidence of ownership." VanDuzor v. Allen, 90 Ill. 499; M. C. R. R. Co. v. Phillips, 60 Ill. 191; Haak v. Linderman & Skeer, 64 Pa. 499; Cf., Chamberlain v. Smith, 44 Pa. 431; Wender Coal Co. v. Louisville Property Co., 137 Ky. 339.

quite out of harmony. The real reason is probably economic.

Whatever interest in the goods the seller does have, however, will pass to his buyer and such buyer stands in his seller's place in respect to trespassers, or as to the right to acquire title from the real owner.¹³

But purely contractual rights do not pass to the buyer except by specific assignment.¹⁴

Estoppel.—Although merely to entrust another with possession of property does not give him such appearance of ownership as reasonably to mislead one who buys from him, and though the real owner is not in such case estopped from setting up his title against one who claims to have been misled, the owner may do such other things *in addition* to giving possession as will create in the possessor a legally sufficient appearance of ownership. In such case, the real owner, having so acted as to mislead a buyer from the one in possession, will be precluded from asserting his title against that buyer. Thus, in *Leavitt v. Fairbanks*,¹⁵ the real owner was held estopped to assert his title because, for many months after he knew that the defendant had bought the goods, he sat quiet and made no attempt to recover them. So, in *Grace v. McKissock*,¹⁶ the real owner lost his title because, having been asked by the buyer if he had an interest in the goods, he said nothing about his title. Again, in *O'Connor v. Clark*,¹⁷ the real owner of a wagon allowed the person in possession to paint his, the possessor's, own name on it for the very purpose of making him appear to be owner. The court held the real owner estopped to set up his title.¹⁸

13—*Ante*, p. 176.

14—*Ante*, p. 199.

15—92 Me. 521.

16—49 Ala. 163.

17—170 Pa. 318.

18—*Johnston v. Milwaukee, etc. Co.*, 46 Neb. 480; cf., as to undorsed notes, *Sublette v. Brewington*, 139 Mo. Ap. 410, 122 S. W. 1150; *Marling v. Fitzgerald*, 138 Wis. 93, 120 N. W. 388.

Particular Types of Property.—There is a tendency to change this strict rule, and to modify its application to certain types of property. Money, for instance, passes from a mere possessor to purchaser in good faith quite free from any rights of the original owner. This is possibly on the ground that money has no ear-marks of identification; more probably for reasons of economic policy. So also, those instruments which were negotiable by the law-merchant and its supplementary statutes now pass from one person to another, free from the rights of an unconsenting original owner. Bonds, in the form of an unconditional promise to pay to bearer, or to the order of a named person, are generally held to pass free from equities under these rules.¹⁹

Many courts apply this exception, more or less inconsistently, to other property in the form of written obligations. Thus the lawful possession of stock certificates has been held to give the possessor power to vest a title in a buyer without notice.²⁰ So also power to pass title has been extended to one intrusted with mere possession of other instruments.²¹

But even the exception in regard to stock-certificates, warrants, and other documents not covered by the Law Merchant, does not apply to persons in possession without the real owner's consent. They must have been "entrusted" with possession by the owner. Thus the manager of a corporation who takes stock-certificates from its safe and sells them without its consent, does not vest

19—Pratt v. Higginson, 230 Mass. 256.

20—Penna. R. R. Co.'s Appeal, 86 Pa. 80, by implication and *dictum*; Russell v. Am. Bell Tel. Co., 180 Mass. 467, in view of custom; Burton's Appeal, 93 Pa. 214; McNeil v. Tenth National Bank, 46 N. Y. 325, but only because indorsed in blank with a power to

sell; Walker v. Detroit Transit Ry. Co., 47 Mich. 338.

21—Scollans v. Rollins, 179 Mass. 346, "non-negotiable" bond; Delfosse v. Metropolitan Nat'l Bank, 98 Ill. Ap. 123, city warrant for payment; Brown v. Perera, 176 N. Y. S. 215, paper money of foreign countries.

a title in the buyer, because he was not entrusted with possession by the company.²²

Bills of Lading.—As to whether one in lawful possession of a bill of lading or a warehouse receipt, properly indorsed, can give a bona fide purchaser the title which he himself has not, there is much confusion. Writers generally indicate that mere possession of an indorsed bill of lading is such evidence of title as will estop the one who has created that appearance from setting up his own title. The actual authority, however, is scant and uncertain. In *National Bank v. Baltimore & Ohio R. R. Co.*,²³ for instance, A sold lumber to B and put him in possession, but with a reservation of title in A till payment. B then delivered the lumber to a carrier and got a bill of lading. This bill he sold to C, who bought in good faith. The court held that C acquired title even against A. Superficially this case indicates that the possessor of a bill of lading can pass a title although he himself has none. But, in fact, Maryland is one of the few jurisdictions in which one in possession of goods themselves, under a conditional sale contract, can vest his buyer with title. So the case means nothing as to the effect of possession of a bill of lading compared with possession of the goods themselves. Again, in *Munroe v. Phila. Warehouse Co.*,²⁴ the purchaser of a bill of lading from one in mere lawful possession of it was protected. But it is not improbable that a state statute declaring bills of lading to be “negotiable” had

22—*Knox v. Eden Music Co.*, 148 N. Y. 441; *Scollans v. Rollins*, 179 Mass. 346, dissenting opinion; *Belknap v. Nat'l Bk.*, 100 Mass. 376, by analogy.

This has been changed by statute in some states, so that the sale

of a properly indorsed certificate of stock by any one in possession will vest title in a bona fide purchaser.

23—99 Md. 61, 105 Am. St. 321.

24—75 Fed. 545, *aff'd.*, 79 Fed. 999.

something to do with the fact that it went "free from equities."²⁵

On the other hand, there is some precise authority to the effect that the buyer of a bill of lading in possession of the seller is no better off than he would have been had the seller merely possessed the goods themselves.^{26*}

Furthermore, whatever may be the rule in cases where the possessor of the bill of lading has been entrusted therewith by the owner, the rule is clear that possession of a bill of lading not entrusted to the possessor by the owner does not enable the possessor to invest its buyer with any rights superior to those of the real owner. This is true even though the owner had entrusted posses-

25—*Cf. Miller v. Browarski*, 130 Pa. 372; *In Commercial Bank v. Armsby Co.*, 120 Ga. 74, sometimes cited for the proposition that possession of the bill of lading is sufficient evidence of title to estop the one who has entrusted possession to the defrauder, there are extraneous circumstances indicating implied authority to sell which were probably the real basis of the decision. In *Pollard v. Reardon*, 65 Fed. 848, the rule as to retention of possession by a seller undoubtedly had some effect. *Willinghams Sons v. McGuffin*, 18 Ga. Ap. 658.

26—*Stollenwerck v. Thacher*, 115 Mass. 224, "A bill of lading, even when in terms running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the

goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances. * * * But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal." *Baker Co. v. Brown*, 214 Mass. 196; *Burton v. Curyea*, 40 Ill. 320, 89 Am. Dec. 350; *Commercial Bank v. Canal Bank*, 239 U. S. 520.

*See Uniform Sales Act, Section 31, ff. See also the related provisions of the Uniform Bills of Lading Act.

Various state statutes have declared bills of lading to be "negotiable". As to their meaning, see *Shaw v. Railroad*, 101 U. S. 557; *Tiedman v. Knox*, 53 Md. 612; *Hardie v. Railroad*, 118 La. 254.

sion of the goods to the person who thereby was enabled to get a bill of lading for them.²⁷

3. PURCHASERS FROM SELLER REMAINING IN POSSESSION AFTER PASSING TITLE

There is a type of case in which one who has possession only, without either title or authority to sell, can invest another, who takes from him in good faith, with rights superior to those of the true owner. This is the case where a buyer has allowed his seller to remain in possession after title has passed and an innocent third person is misled thereby.*

Fraud as a Reason.—These cases, considered as a matter of *result* rather than of theory, are divided into two groups. The primary decision on this point is *Twyne's case*²⁸, decided in 1601. A statute of 13 Elizabeth provided, in effect, that all grants intended to hinder or defraud creditors should be void, in so far as they accomplished that result. In *Twyne's Case*, the seller had continued in possession of the goods and the court considered this, along with other matters, as evidence of intent to defraud. The sale was, therefore, set aside.

The first group of cases is in harmony with *Twyne's Case*, although they may go somewhat further. They hold that retention of possession by the seller is *prima*

27—*Decan v. Shipper*, 35 Pa. 239, 78 Am. Dec. 334; *Hart v. Boston & M. R. R. Co.*, 72 N. H. 410, property itself had been entrusted to defrauder; *Merchants Nat'l Bk. v. Bates*, 148 Ala. 279, property itself had been stolen; *Raleigh & G. R. Co. v. Lowe*, 101 Ga. 320, bill of lading had been stolen by the seller; *Tison & Gordon v. Howard*,

57 Ga. 410; *Commercial Bk. v. Hurt*, 99 Ala. 130, 12 So. 568; *Seal, Lawson & Co. v. Zell & Sons*, 63 Md. 356; *Mechanics & Traders Bk. v. Farmers etc. Bk.*, 60 N. Y. 40; *The Idaho*, 93 U. S. 575; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541.

28—3 Coke 80.

*See Uniform Sales Act, Section 25.

facie evidence of fraud in the first transaction and, because of this fraud, it will be set aside in favor of subsequent *bona fide* buyers or attaching creditors. This *prima facie* inference of fraud is rebuttable, however, by proof that there was in fact no fraud intended.

According to these decisions, "no transaction shall be considered fraudulent, which is not so in point of fact.

* * * Possession remaining with the vendor, after an absolute sale of personal property, is a badge of fraud, devolves on the party the necessity of showing that the transaction is honest, and that a sufficient consideration has been paid for it. By so doing, the apparent incongruity of the ownership not being with the possession is explained; and certainly the plaintiff has no claim on the principles of justice, to have his execution satisfied out of property which does not belong to the defendant in execution".²⁹

In the case just quoted from, the court indicates that mere payment of proper consideration and good faith in the transaction generally, is sufficient to rebut the presumption of fraud arising from the retention of possession.³⁰

29—Blocker v. Burness, 2 Ala. 354. The court eliminates a correlated but entirely different problem which has caused confusion in other cases by saying, "Should the property be suffered to remain so long, that the possessor acquired a delusive credit from the apparent ownership after such sale, another question depending on different principles would arise, which it is not necessary to determine at this time."

30—That retention of possession creates only a rebuttable presumption of fraud, see: Hobbs v. Bibb, 2 Stew. (Ala.) 54, rejecting the "fraud *per se*" rule of Edwards v. Harben, 2 Term R. 587, and criti-

cizing its adoption by the Supreme Court, in Hamilton v. Russell, 1 Cranch 309, and discussing the original authorities generally. Mayer v. Clark, 40 Ala. 259; Hight v. Harris, 56 Ark. 98, delivery of title and delivery of possession hopelessly confused in verbiage, but although there was in fact no delivery of possession and no sound reason for its retention yet the first buyer was protected; Burke v. Sharp, 88 Ark. 433; Fleming v. Townsend, 6 Ga. 103, "the question of fraud or not is submitted to the jury;" but cf. Beers v. Dawson, 8 Ga. 556; Jones v. Newberry, 16 Ga. Ap. 424, 85 S. E. 617; Bryant v. Kelton, 1 Tex. 415,

Policy as a Reason.—The second group comprises those decisions which hold that, where the seller has retained possession, the first sale will be ineffective against subsequent purchasers and attaching creditors, quite regardless of whether the first transaction was tainted with fraud or not. The *results* in this group of cases are essentially similar, but the different *theories* upon which these results are reached subdivide the group into four classes.

One class puts the result on the theory that as between immediate parties title will pass without any change of possession, but that delivery of possession is necessary to pass the title as against subsequent purchasers and creditors who take possession. The vague meaning given to "title" in such statements speaks for itself. But the result is clear; the first buyer, unless he takes possession, loses his rights in respect to the goods as against the subsequent *bona fide* takers, quite regardless of any real fraudulent purpose in the first sale or in the retention of possession.³¹

A second sub-group puts the loss of the first buyer's rights upon the ground of "public policy." They recognize that, as between the parties, title may have passed without delivery of possession.³² But, frankly disregarding of the question of fraudulent intent, they set the first buyer's title aside in favor of the subsequent purchasers and creditors as a matter of sound policy. This theory is, however, so often undistinguished from that of the third group as to make actual separation of the decisions impossible.

discussing the original authorities; *Higgins v. Spahr*, 145 Ind. 167.

31—*Lanfear v. Sumner*, 17 Mass. 110; *Dempsey v. Gardner*, 127 Mass. 381, "by the law as established in this Commonwealth, it was necessary, as against subse-

quent purchasers or attaching creditors, that there should be a delivery of the property"—the question of fraud or good faith was not allowed to go to the jury.

32—*Frost v. Woodruff*, 54 Ill. 155; *Corgan v. Frew*, 39 Ill. 31.

The theory of the third class is that fraud in the first transaction is the reason for setting it aside in favor of creditors and later buyers. But in order to carry out a general policy of setting the first transaction aside regardless of the presence or absence of *actual* fraud, they introduce a fiction, a pure pretense. They hold that the retention of possession is "constructive fraud," or is "conclusive evidence" of fraud. As a consequence of this pretense, a sale under which possession has not been delivered to the buyer is "fraudulent in law, as to creditors and subsequent purchasers, notwithstanding the sale may have been in good faith and for an adequate consideration."³³

But even in these states, where fraud is really immaterial and the retention of possession is the true reason for invalidating the first sale, the rule is not applied absolutely. By the introduction of another fiction the courts avoid it in some cases. Where there is in fact no fraud, and the actual delivery of possession is physically impracticable, they are apt to hold that "where an actual delivery by taking or removing the property is impracticable, a symbolic delivery will answer."³⁴ But these courts will not apply this doctrine of constructive delivery merely because there was in fact no fraud;

33—O'Leary v. Bradford, 39 Ill. Ap. 182, *dictum*; Corgan v. Frew, 39 Ill. 31; Huschle v. Morris, 131 Ill. 587, even though retention of possession was specifically provided for in the bill of sale; Bass v. Pease, 79 Ill. Ap. 308.

Gardiner v. McDonough, 147 Cal. 313, inextricably confused with the doctrine of implied authority to resell; Daniel v. Morrison's Exr. 6 Dana (Ky.) 182; Stephens v. Gifford, 137 Pa. 219.

Hamilton v. Russell, 1 Cranch 309, fixing the rule for the Federal Courts.

In some states the rule is fixed

by statute, Brooklyn Cooperage Co. v. Cora etc. Co., 137 La. 807; Bass v. Abeles, 143 Mo. Ap. 274, 126 S. W. 1002; Rankin v. Schultz, 141 Ia. 681, 118 N. W. 383.

34—Lewis v. Swift, 54 Ill. 436; Ticknor v. McClelland, 84 Ill. 471; Thompson v. Wilhite, 81 Ill. 356, constructive delivery of growing corn sufficient; Jewett v. Lincoln, 14 Me. 116, 31 Am. Dec. 36. Hobbs v. Carr, 127 Mass. 532; Western Mining Co. v. Quinn, 40 Mont. 156, 135 Am. St. Rep. 612; Ingalls v. Herrick, 108 Mass. 392; Cf., however, Lanfear v. Sumner, 17 Mass. 110.

there must have been some real impracticability in the way of actual delivery.³⁵

The fourth sub-class of this group sets the first sale aside regardless of actual fraud, but evidences distinct uncertainty as to just why it is so set aside.

Thus in Connecticut it was decided in *Meade v. Smith*³⁶ that title passed irrespective of delivery of possession, not only as between the parties, but as to third persons as well. A retention of possession by the seller, said the court, or a revesting of possession in him after a formal delivery to the buyer, "furnishes, in all cases, presumptive evidence that the sale was fraudulent, open however to explanation." And in this case the court held the explanation quite sufficient to rebut the presumption. But some years later, in *Hatstat v. Blakeslee*,³⁷ it appeared that the buyer of a wagon, who had taken actual possession, returned it to the seller to be painted. Creditors of the seller thereafter attached it, and the court held that the buyer's rights were lost, saying, "This rule of law, that the retention of possession of personal property by the vendor is conclusive evidence of a colorable sale, is a rule of policy, required for the prevention of fraud, and is to be inflexibly maintained."³⁸

Still later, the opinion in *Huebler v. Smith*³⁹ combined this conflict into one case. The court quoted with approval the statement in *Hatstat v. Blakeslee*, and others to the effect that, "That the retention of possession of personal property by the vendor after a sale raises a presumption of fraud which cannot be repelled

35—*Thompson v. Wilhite*, 81 Ill. 356, transaction admittedly without fraud, nevertheless fact that buyer employed seller to feed the hogs sold held no evidence of change of possession; *Cobb v. Haskell*, 14 Me. 303, 31 Am. Dec. 56.

36—16 Conn. 346.

37—41 Conn. 302.

38—*Lucas v. Birdsey*, 41 Conn. 357, "The policy of our law forbids the retention by the vendor of the possession of personal chattels after a sale, and, except as between the parties, makes such retention very strong, if not indeed conclusive evidence of a colorable sale." (*dictum*.)

39—62 Conn. 186.

by any evidence that the transaction was *bona fide* and for valuable consideration, is still adhered to and enforced by the courts of this state with undiminished rigor, as a most important rule of public policy. * * * The reason of extending it from a mere rule of evidence, calling it a badge of fraud only, and arbitrarily declaring, as a matter of law, that it renders the sale void as to creditors, notwithstanding the highest evidence as to the honesty of the sale, is because it has been thought better to take away the temptation to practice fraud than to incur the danger arising from the facility with which testimony may be manufactured to show that a sale was honest." Despite this strong statement, however, the court held that where the sale was a judicial one conducted by an officer of the court and there was really no fraud, the rule did not apply, although the original owner was left by the buyer in continued possession.

Probably the true rule represented by this group of decisions is that stated in *Osborne v. Tuller*⁴⁰, that the retention of possession invalidates the buyer's title, regardless of what the *jury* may think as to good faith, but does not invalidate it if the *court* is convinced that there was *some sound reason* for the retention, such as *impracticability of actual change*. In these cases it is not mere absence of actual fraud which will protect the buyer, but some positive justification for the retention of possession is required.⁴¹

40—14 Conn. 529.

41—*Gibson v. Love*, 4 Fla. 217, the possession indicates fraud unless explained, "as for instance, that the sickness of the slave Henry made his delivery impossible;" *Volusia County Bk. v. Bertola*, 44 Fla. 734; *Gardiner Bk. v. Hodgdon*, 14 Me. 453; *Coburn v. Pickering*, 3 N. H. 415; *McDonough v. Prescott*, 62 N. H. 600; *Chamberlain Co. v. Tuttle*, 75 N. H. 171, 71 Atl. 865; *Miller v. Shrev-*

er, 29 N. J. L. 250, overruling the statement as to the conclusive presumption in *Chumar v. Wood*, 6 N. J. L. 155; *Nelson v. Good*, 20 S. C. 223; but cf. *Pringle v. Rhame*, 10 Rich. L. (S. C.) 72, where actual fraud or not was said to be for jury; *Pregnall v. Miller*, 21 S. C. 385; *Sturdevant v. Ballard*, 9 Johns. (N. Y.) 337; *Dickman v. Cook*, 17 Johns. (N. Y.) 332; *Clayton v. Anthony*, 6 Rand. (Va.) 285; *Davis v. Turner*, 4 Grat. (Va.)

The whole matter is further complicated by the assertion or denial of many courts, no matter in what group their actual decisions belong, that if the retention of possession is provided for specifically by the bill of sale, it is not fraudulent.⁴²

The effect of retention, whatever it be in the different jurisdictions, runs not only in favor of subsequent purchasers, but of attaching creditors as well. It is not even essential that the creditor shall have been actually misled by the seller's retention, for the legal effect of retention relates to prior creditors as well as to those subsequent to the first sale.^{43*} But one who became a creditor subsequent to the sale, with actual knowledge of the sale, can not have it avoided in his favor.⁴⁴

What Constitutes Possession.—In none of these cases is change of *position* considered as necessary to actual change of possession.⁴⁵

423, overruling the earlier rule of conclusive presumption; Cf., *Curd v. Miller*, 7 Gratt. (Va.) 185. *Poling v. Flanagan*, 41 W. Va. 191; *Blocker v. Burners*, 2 Ala. 354, dissenting opinion; *Cocke v. Chapman*, 7 Ark. 197; *Field v. Simeo*, 7 Ark. 269.

42—*Hamilton v. Russell*, 1 Cranch 309; *Holliday v. McKinnie*, 22 Fla. 153; *Bass v. Pease*, 79 Ill. Ap. 308; Cf. *Huschle v. Morris*, 131 Ill. 587; *Osborne v. Tuller*, 14 Conn. 529, explaining that it means "legally" consistent with the deed.

43—*Gibson v. Love*, 4 Fla. 217, surety on seller's bond protected; *Johnson v. Holloway*, 82 Ill. 334, prior creditors; *Fleming v. Townsend*, 6 Ga. 103, subsequent creditors; *Streep v. Eckart*, 2 Wharton 302, 30 Am. Dec. 258; *Anderson*

v. Anderson, 64 Ala. 403, whether claim is contingent or absolute; *Bongard v. Block*, 81 Ill. 186, *id.*; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520; cf. *Seward v. Jackson*, 8 Cow. (N. Y.) 406.

44—*Kane v. Roberts*, 40 Md. 590, constructive notice; *Sledge v. Oberehain*, 58 Miss. 670, *id.*; *Lehmberg v. Biberstein*, 51 Tex. 457.

45—*Piner v. Cover*, 55 Ill. 391; *Jewett v. Lincoln*, 14 Me. 116, 31 Am. Dec. 36; *Bass v. Pease*, 79 Ill. Ap. 308; Cf., as to what constitutes change of possession, *Dooley v. Pease*, 180 U. S. 126; *Stephens v. Gifford*, 137 Pa. 219.

Delivery to carrier, consigned to buyer, is sufficient, *Cary v. Williams*, 47 Colo. 256, 107 Pac. 219.

*See Uniform Sales Act, Section 26.

Bills of lading and other documents which evidence a carrier's or warehouseman's possession of property and which must be surrendered to the carrier or warehouseman in order to secure possession of the property are sometimes treated for purposes of title as though they were the goods themselves. Possession of such documents is theoretically the possession of the goods. Hence a transfer of possession of such a bill of lading or warehouse receipt is theoretically transfer of possession of the goods. Even in states absolutely requiring transfer of possession to perfect a buyer's title as against subsequent purchasers from the seller, it is possible that the transfer of a bill of lading representing the property would be sufficient.⁴⁶ There is, however, an obvious unreality in pretending that possession of the bill of lading is possession of the goods. Like all pretenses it is potent for trouble. When one bill of lading is the only key by which actual possession may be had, it is justifiable to give its possession the effect of possession of the goods. But when it is not the only key, such a holding defies all the reasons on which the setting aside of the first buyer's title is based.

4. PURCHASERS FROM ONE WHO HAS TITLE, BUT NOT POSSESSION

Subject to Original Owner's Rights.—A seller who does not have possession, but does have title, can invest his

46—The leading case is *Barber v. Myerstein*, L. R. 4 H. of L. 317, in which one Abraham, the owner of property represented by a bill of lading in triplicate, pledged the property to Myerstein and gave him possession of two copies of the bill of lading. Later on Abraham pledged the same goods to Barber and gave him possession of the third copy of the bill of lading. Barber used his copy first, and got possession of the goods

from the carrier. Myerstein then brought suit as owner of the goods, and the court upheld his claim, saying, "When the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property, is the property itself." *Accord*, *Broadwell v. Howard*, 77 Ill. 305.

buyer with what he has, namely, title. But he can not by the sale cut off the rights of the original owner. These rights of the original seller are, as we have seen, only the right of a seller's lien and its extension by way of stoppage *in transitu*. So long as the seller retains possession, in the absence of credit to the buyer he has a lien upon the goods themselves for payment.⁴⁷ This right exists even though the title itself has passed to a third person who paid for it in ignorance of any outstanding rights. The second seller's lack of possession is sufficient to put a purchaser from him on notice of such rights.⁴⁸ But the sub-purchaser having acquired such rights as his seller did have, has a right to acquire possession by tendering payment before the lien has been enforced.⁴⁹

Likewise, a seller's right to stop *in transitu* upon discovery of his buyer's insolvency is not lost through that buyer's having resold even to a purchaser in good faith—unless the latter buys on the strength of a bill of lading.⁵⁰

47—*Ante*, p. 111.

48—*Perrine v. Barnard*, 142 Ind. 448; *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302; *Robinson v. Morgan*, 65 Vt. 37; *Tuthill v. Skidmore*, 124 N. Y. 148; *M'Ewan v. Smith*, 2 H. L. Cas. 309.

49—*Pardee v. Kanady*, 100 N. Y. 121; *New England Iron Co. v. Gilbert etc. Co.*, 91 N. Y. 153, by analogy.

50—*Kemp v. Falk*, L. R. 7 App. Cas. 573, cited in *McElwee v. Metropolitan Lumber Co.*, 69 Fed. 302; *Pattison v. Culton*, 33 Ind. 240, 5 Am. Rep. 199, but here, although the court talks of stoppage *in transitu*, the title was in fact still in the seller and he was merely retaking his own goods; *Eaton v. Cook*, 32 Vt. 58, *dictum*; *Brenan v. Atlanta etc. R. R.*, 108

Ga. 70, 79 Am. St. 26, even though an *undorsed* bill of lading was given to the sub-buyer; *Pattison v. Crilton*, 33 Ind. 240, 5 Am. Rep. 199, making an express distinction between the resale without transfer of a bill of lading and one accompanied by such transfer; *Ilseley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29; *Sheppard v. Newhall*, 54 Fed. 306, unaffected by delivery of *undorsed* bill of lading; *Holbrook v. Vose*, 19 N. Y. Superior 76; *Delta Bag Co. v. Kearns*, 112 Ill. Ap. 269; *Clapp Bros. v. Sohmer*, 55 Iowa 273; *Ocean S. S. Co. v. Ehrlich*, 88 Ga. 502, 30 Am. St. 164, even though the bill of lading was shown, but not delivered, to the sub-buyer, the freight receipts given him and he received a part of the goods from the carrier;

Purchase of Bill of Lading.—The seller's right to stop is defeated, however, if he has put his buyer in possession of a properly indorsed bill of lading which the latter transfers to his own buyer.* This was decided in the case of *Lickbarrow v. Mason*.⁵¹ It appeared that the buyer had pledged the goods and delivered the bill of lading to Lickbarrow. But the seller, having discovered that the buyer was bankrupt, retook possession of the goods from the carrier. Lickbarrow then sued in trover. The intermediate appellate court decided that title had never passed to the buyer and that Lickbarrow therefore got no title. The House of Lords, however, held that title had passed to the buyer. The seller's only right against the goods, therefore, was the right to stop *in transitu*. But by the buyer's pledge to Lickbarrow his title passed to the latter. The question was thus squarely presented, whether Lickbarrow's title was subject to the original seller's right to stop *in transitu*. The House of Lords held that it was not so subject. This decision it put clearly on the ground that the right to stop *in transitu* is an equity and will prevail against a bare legal title, but it will not prevail against one who, having bought for a fair consideration, has himself an equity coupled with his legal title.

This equity in the sub-buyer was said to arise from his having purchased the goods for good consideration and without notice. The sub-seller's possession of a bill of lading was not mentioned as having anything specifically to do with the matter of the sub-purchaser's equity, although it was discussed in relation to the transfer of title. From the case itself it might be concluded that a sub-buyer for value and without notice from one not having a bill of lading would be treated as having an "equity" connected with his title and therefore to be

Gass v. Astoria Veneer Mills, 118 51—6 East 20, note. 2 Term. N. Y. S. 982, even though "non- Rep. 63. negotiable" bill was delivered.

*See Uniform Sales Act, Section 62.

protected. But while the precise statement on the matter is somewhat scant, the authorities cited in the preceding discussion clearly limit the seller's loss of his right to cases where the sub-buyer has relied on the first buyer's possession of a bill of lading.⁵²

It is still indeterminate what is the effect of a transfer of a bill of lading *after* the seller has notified the carrier of his stoppage *in transitu*. One phase of the matter was decided in *Newhall v. Central Pacific Rr. Co.*⁵³ Two hours after the seller had notified the carrier not to deliver the goods, the buyer pledged the bill of lading to the plaintiff. The latter presented the bill to the carrier and demanded the goods; the carrier refused because of the seller's orders to stop, and suit was brought against the carrier. Judgment was given for the plaintiff. Delivery of the bill of lading, said the court, had passed the title to him, and in relying on his seller's possession of the bill of lading he acquired quite as strong an equity in the goods as though the orders to stop had not been given. Hence, having both title and an equity, his right to the goods was superior to that flowing from the seller's bare equity. This, however, appears to be the first decision precisely

52—That re-sale with transfer of the indorsed bill of lading defeats stoppage *in transitu*, see: *Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 183, making an express distinction between the case and one where there was no transfer of bill of lading; this case holds also that knowledge that goods had not been paid for would not affect sub-purchaser's rights, but his knowledge of his seller's insolvency would do so. *Missouri Pac. R. R. v. Heidenheimer*, 82 Tex. 105, 27 Am. St. 861, even though the bill was stamped "duplicate." *St. Paul Roller Mill Co. v. Great Western Co.*, 27 Fed. 434, as collateral security for antecedent debt.

Nat'l Bk. v. Schmidt, 6 Colo. Ap. 216, right is lost by transfer as security for antecedent debt, citing authority; *Shepard v. Burrows*, 62 N. J. L. 469, mere knowledge that goods are not paid for does not affect sub-purchaser's position; *Audenreid v. Randall*, 3 Cliff. 99, Fed. Cas. #644. But see, *contra*, *Castanola v. Mo. Pac. R. R. Co.*, 24 Fed. 267; *Lee v. Kimball*, 45 Me. 172, even though consideration was payment of antecedent debt; *Dymock v. Midland Nat'l Bank*, 67 Mo. Ap. 97, seller's right *not* lost by transfer of bill of lading as security for an antecedent debt.

53—51 Cal. 345, 21 Am. Rep. 713.

involving the point, and was so stated by the court. It is also, so far as the author has discovered, the only decision involving the particular question.^{54*}

Assuming that the decision in the Newhall case will stand, there is left undecided the possible case of sale of the bill of lading after the seller had not only ordered the goods stopped *in transitu*, but had also, with a "duplicate" bill of lading, or without any, secured possession of the goods. The obvious difficulty in answering this question is due to the fact that the whole doctrine growing out of Lickbarrow v. Mason is illogical. That opinion declared that the sub-buyer had an equity in the goods. But the sub-buyer did not rely on his seller's possession of the goods. Therefore, if he had an equity, every sub-buyer who relies on his seller's word should also have an equity. Possession of the bill of lading is no more indicative of a title free from someone's else right of stoppage *in transitu* than is no possession. In fact, it shows that the goods are still in transit and therefore subject to stoppage. So far as Lickbarrow v. Mason is concerned, every sub-buyer, whether of a bill of lading or not, *would* be protected. But, in other cases, sub-buyers who have not relied on a bill of lading are not protected. The bill of lading has therefore been given an illogical value as denoting a free title. The result is difficulty where the logical and the illogical meet.

Pledges.—Even the delivery of a bill of lading defeats the original seller's right of stoppage only to the extent of the legal interest created in the third person. If the latter is a sub-buyer, so that he gets complete ownership, the original seller's right is lost entirely, no matter what

54—In Poole v. H. & T. C. Ry. Co., 58 Tex. 134, there was a transfer of the bill of lading after notice to stop had been given, but the taker accepted it with intent to defeat a probable stoppage, so

that the rights of a taker in good faith were not involved. In Bank v. Ry Co., 69 Mo. Ap. 246, there is a casual *dictum* in accord with Newhall v. Central Pacific R. R.

*See Uniform Sales Act, Section 62.

amount the sub-buyer actually paid—provided, of course, it was not so little as to derogate his good faith. But if the third person is not a buyer, but a pledgee only, then his legal interest is to the amount of his pledge only and the seller's right of stoppage is lost only to that extent. The right of stoppage still exists against whatever right in the goods the original buyer may still have.⁵⁵

There is some question, however, whether the seller can stop the goods and thereafter pay the buyer's pledgee the amount of his interest, or must pay the pledgee before he can stop the goods. In *Mo. Pac. R. R. Co. v. Heidenheimer*,⁵⁶ the carrier was sued by the buyer's pledgee for refusal to deliver the goods. The defense was, that, the buyer having become insolvent, the seller had ordered delivery stopped. The court intimated that the seller would be protected as to any surplus over the amount of the pledge, but decided that, "in any event, it must, we think, be conceded that if the transfer by way of pledge or mortgage, or as collateral security for a loan, does not absolutely defeat the right of 'stoppage *in transitu*,' the seller can not exert that right until he has discharged the debt secured by the transfer, as his right is subject to that of the mortgage or pledgee." Consequently, the carrier was bound to deliver to the pledgee so long as his right was outstanding. The authority on the matter is too scant for it to be determined definitely whether satisfaction of the pledgee's interest is a condition precedent to the right to stop or not.

55—*Chandler v. Fulton*, 10 Tex. 2, 60 Am. Dec. 188; *Spalding v. Ruding*, 6 Beavan 376, "As against Thomas (the buyer), I think that the plaintiffs had a right to stop the goods *in transitu*; and, although the legal right to the goods was transferred (to Thomas' pledgee) with the bill of lading, yet

I think that, in equity, the transfer took effect only to the extent of the consideration paid by the transferee, leaving in the plaintiffs an equitable interest in the surplus value." *Berndtson v. Strang*, L. R. 4 Equity 481.

56—82 Tex. 195, 27 Am. St. 861.

5. PURCHASERS FROM ONE WHO HAS POSSESSION AND A VOIDABLE TITLE

When both title and possession are in the buyer, the seller, as we have seen, has no rights at all against the goods except the right to revest title in himself if the sale was induced by the buyer's fraud. As, with this exception, the goods are free from any rights of the seller while title is in the buyer, it follows that a third person, purchasing from the buyer, or otherwise standing in his shoes, will hold the goods equally free from any claims of the seller.

But furthermore, a third person who has purchased the goods from the buyer, in good faith, acquires a title which is free even from the seller's right to rescind the sale because of fraud. That is to say, the original seller's right to revest title in himself because of the buyer's fraud is lost if not exercised before his buyer resells to a third person acting in good faith. So, if A sells goods to B and gives B possession, if the transaction was induced by fraud on the part of B, A may revest title in himself and retake the goods from B. But if before A does so, B passes on the title to C, who takes it for value and in good faith, A can not retake the goods from C. This rule is undoubtedly based on the same principle that permits a buyer to cut off his seller's right of stoppage *in transitu* by sale of the bill of lading. That is to say, although the buyer has title, it is subject to the defrauded seller's right to retake it; but when the buyer has passed his title to a sub-purchaser, the latter has not only title, but also an equitable right in the goods, and the two together are superior to the seller's right.^{57*}

57—Truxton v. Fait & Slagle Co., 1 Penna. (Del.) 483, 73 Am. St. Rep. 81, "Until the contract is rescinded or avoided, the title or property in the goods is in the

buyer, and he may sell or dispose of them to a bona fide purchaser for value, and thus vest in him a good, indefeasable, and irrevocable title to the property. * * *

*See Uniform Sales Act, Section 24.

Purchaser Not in Good Faith.—A sub-purchaser who has not taken the goods in good faith, or for value, although he may get his seller's title, does not couple an equitable right in the goods with it, and is, therefore, in no better position to resist the original seller's right to the goods than was the original buyer.⁵⁸

A consignee of goods who in good faith makes advances upon them stands precisely in the same position as a purchaser for value, as against the original vendor, and the same principles of law, in this regard apply to this case." *Schloss v. Estey*, 114 Mich. 429; *Pelham v. Chattahoochee Grocery Co.*, 146 Ala. 216, 119 Am. St. Rep. 19, stating the rules as to the burden of proof; *Lee v. Wilkins*, 79 Mo. Ap. 159, mortgagee of fraudulent buyer protected; *Levi v. Bray*, 12 Ind. Ap. 9, "It is well settled that even though a sale of property is induced by fraud the title vests in the vendee, subject to the right of the vendor, upon discovering the fraud to rescind. Until the vendor elects to rescind, the title to the property remains in the vendee, and a sale by him for value to a third person who is ignorant of the fraud, vests a good title in the latter, even against the original vendor." *Wilk v. Key*, *Simmons & Co.*, 117 Ala. 285, as to sub-buyers who take in payment of existing debt; *Donaldson v. Byrd & Co.*, 16 Ky. L. R. 448; *Hochberger v. Baum*, 85 N. Y. S. 385; *Tetrault v. O'Connor*, 8 N. D. 15; *National Bk. v. Balt. & O. R. R. Co.*, 99 Md. 661, 105 Am. St. Rep. 321; *Levi v. Booth*, 56 Md. 305, *dictum*; *B. & O. Ry. Co. v. Good*, 82 O. S. 278.

Some few cases indicate that where the first sale has been induced by fraud it is absolutely void and vests no title in the buyer, but that, apparently arbitrarily, a sub-purchaser from him will be treated as having title. *Catlin v. Warren*, 16 Ill. Ap. 418, but cf. *Reid, Murdoch & Co. v. Sheffy*, 99 Ill. Ap. 189; *Root v. French*, 13 Wend. (N. Y.) 570.

A sale, or assignment, of a right against a person, as distinct from rights in respect to a particular thing, does not vest the buyer, if guilty of fraud, with power to pass his right untainted with the fraud to an innocent sub-buyer. A contrary rule is found in some jurisdictions. See *Williston on Contracts*, § 438.

58—*Reid, Murdoch & Co. v. Sheffy*, 99 Ill. Ap. 189; *Mashburn & Co. v. Dannenburg Co.*, 117 Ga. 567, pledgee as security for antecedent debt not protected because "the debt of the mortgage creditor was not contracted on the faith of the property in possession of the debtor." *Schweitzer v. Tracy*, 76 Ill. 345, attaching creditor; *Oswego Starch Factory v. Lendrum*, 57 Iowa 573; *Butters v. Haughwont*, 42 Ill. 18, taken in payment of existing debt, protected; *Load v. Green*, 15 M. & W. 216, assignee in bankruptcy not protected.

What Constitutes a Voidable Title.—On the other hand, as we have already seen, if the first buyer has no title himself, but only possession, a buyer from him, no matter how innocent, will get no title. So, where possession is given to one claiming to be agent of another, if it turns out that the “agency” was a fiction and the pretended agent had no authority to act for his alleged principal, but was getting possession solely for himself, there is no title in him. The contract of sale was not made with him individually, but with his principal, through him as agent. If it turns out that there was in fact no principal for him to represent, then there was no party on his side of the contract and, in consequence, no contract. There being no contract, no title could have passed out of the “seller.” It could not have passed to the fictitious principal; there was no intention to pass it to the alleged agent himself; it would still be in the seller. The alleged agent, having no title, although he be in possession, can give no title to a purchaser.⁵⁹

Some difficulty in applying this rule arises in cases where the seller does intend to pass title to the physical person to whom he gives possession, but believes him to be another, metaphysical, person of a certain name and credit. Thus, if B represents himself to A as being X and having X’s credit, and A deals with B and puts him in possession, the question arises, did B get even a voidable title.

In such a case there are three possibilities as to A’s real intent. He may have intended to pass title to the person represented by the visible characteristics before him. Or, he may have intended to deal with a person repre-

59—Smith Premier Typewriter Co. v. Stidger, 18 Colo. Ap. 261, citing Hamet v. Letcher, 37 O. S. 356 and Parker v. Dinsmore, 72 Pa. St. 427; Rogers v. Dutton, 182

Mass. 137, even though the alleged principal was himself the sub-purchaser and the seller sent the goods direct to him.

sented by the nominal and credit characteristics of X. Or he may have intended to deal with a person represented by both the visible characteristics before him and the name and character of X. In the latter case there would be no contract, because there was no such person and, therefore, there was no "other side" to a contract. This seems the most probable intent on A's part, but the courts ignore it. They assume that he intended to deal with one or the other of the existing personalities. If A intended to deal with that represented by the name and credit of X, then, again, there would be no contract. The person, X, existed, but he did not enter the contract and therefore, as in the other case, the contract would have but one side—and would not be truly a contract. But if A intended to deal with the person represented by the visible characteristics, then there would be a contract, even though entered into through mistake, because that same person intended to contract with A.

When the conflict of possibilities is between the person of nominal characteristics and the person of visible characteristics—the courts ignore the third possibility—intent to deal with the visible one is assumed.⁶⁰ But where the

60—*Edmunds v. Merchants Dispatch Co.*, 135 Mass. 283, "We think it clear, upon principle and authority, that there was a sale, and the property in the goods passed to the purchaser. * * * The minds of the parties met * * *. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name * * *." This case was cited and followed in *Phillips v. Brooks*,

[1919] 2 K. B. 243; *Martin v. Green*, 117 Me. 138; *Phelps v. McQuade*, 220 N. Y. 232 L. R. A. 1918 B 973. The rule appears to be in dispute in regard to orders for the payment of money. That is, where a payee is named and the maker of the instrument gives it to one whom he supposes to be so named but is in fact not that nominal person, some courts hold that the drawee must pay to the nominal person intended by the drawer and is not protected in paying to the mere physical personality whom the drawer thought was the bearer of the name.

Dodge v. National Exch. Bk., 20

confusion is between the nominal personality and that represented by *handwriting*, or characteristics other than physical appearance, the rule appears to be to treat the nominal person as the one really intended.⁶¹

—**Avoidance by Infants.**—An infant's right to avoid his contract of sale and to retake title and possession of the chattel sold is not based upon mere equitable right, but is a matter of public policy in his protection. Consequently, when a third person has acquired the chattel for value from the infant's buyer, that third person's right to keep it as against the infant seller does not depend on a comparison of equities as affected by the legal title. It depends on whether public policy, as interpreted by the

O. S. 235; *Tolman v. Am. Nat'l Bk.*, 22 R. I. 462, 84 Am. St. Rep. 850; *Simpson v. Denver & R. G. R. R.*, 43 Utah 105, 46 L. R. A. (n. s.) 1164; Cf. *Mercantile Nat'l Bk. v. Silverman*, 132 N. Y. S. 1017, aff. 210 N. Y. 567.

But *contra*, *Land Title & Tr. Co. v. Northwestern Bank*, 196 Pa. 230, 79 Am. St. Rep. 717, 50 L. R. A. 75, annotated; *Robertson v. Coleman*, 141 Mass. 231; *Heavey v. Com. Nat'l Bk.*, 27 Utah 222; *Hoffman v. Am. Exch. Bk.*, Neb., 96 N. W. 112; *Jamieson v. Heim*, 43 Wash. 153; *Boatsman v. Stockman's Nat'l Bk.*, 56 Colo. 495; *McHenry v. Nat'l Bk.*, 85 O. S. 203, 38 L. R. A. (n. s.) 1111 N.

61—*Pacific Express Co. v. Shearer*, 160 Ill. 215, rejecting the decision in *Samuel v. Cheney*, 135 Mass. 278; *Consumers Ice Co. v. Webster*, 53 N. Y. S. 56, *dictum* to the effect that physical presence of agent will not dominate nominal characteristics.

Cundy v. Lindsay, 3 App. Cas. 459, name dominated hand-writing. *Newberry v. Norfolk & S. R. Co.*, 133 N. C. 45. Some confusion is caused in these cases by confounding the question of which personality was intended, with the question whether a carrier is absolutely bound to deliver to the person so intended. On the latter question there is considerable diversity of opinion.

Contra, as to payee of a promissory note, *First Nat'l Bk. v. Am. Exch. Bk.*, 63 N. Y. S. 58, 170 N. Y. 88; in *Sherman v. Corn Exch. Bk.*, 86 N. Y. S. 341; the real owner of the goods for which the note was given was held the proper payee, although the maker had in mind another person of the same name. The maker had in mind a person who had both furnished the consideration and had certain other characteristics; as there was no such person the former characteristic was held indicative of the legally proper payee.

courts, requires the right of rescission to be available even against such third persons. The decided cases indicate that the infant can retake even from them.^{62*}

—**Avoidance by Insane Persons.**—Where the seller is insane, a purchaser from his buyer is in no better position than is that first buyer, but the right of the insane person to avoid even as against the first buyer varies in different jurisdictions. The weight of authority is that he can not avoid against even his own buyer, who took in good faith and for fair consideration, without restoration of the consideration.⁶³

62—Hill v. Anderson, 5 Smed. & M. (Miss.) 216; Downing v. Stone, 47 Mo. Ap. 144.

For the analogy of the same rule in sales of real property, see Harrod v. Myers, 21 Ark. 592, 76

Am. Dec. 409; McMorris v. Webb, 17 S. C. 558, 43 Am. Rep. 629.

63—For a compilation of authority see the note in Annotated Cases, 1914 D 867.

*See Uniform Sales Act, Section 2.

CHAPTER VI

THE STATUTE OF FRAUDS

1. CONTRACTS AFFECTED BY THE STATUTE

In 1677 the English Parliament put into effect the Statute of Frauds. This was enacted, according to its preamble, "For prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury." Its several sections cover various contracts and conveyances of land.

The seventeenth section concerns contracts for the sale of goods and reads, "No contract for the sale of any goods, wares or merchandises for the price of ten pounds Sterling or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

The substance of this statute, in slightly varying form, has been enacted into law in most of the states of the Union.^{1*} The application of the rule to particular cases has been a most prolific source of litigation.

1—This Statute did not become a part of the common law and, therefore, is not in force in this country except as it has been enacted into law by the legislatures of the several states. *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274.

This Statute should not be confused with statutes declaring sales in fraud of creditors to be void, as was done in *Mahan v. U. S.*, 16 Wall. 143.

*See Uniform Sales Act, Section 4, (1).

Executory Contracts.—The first question to arise concerning its application is, "What is a contract of sale?" Does it mean a contract by which title has passed and the change of ownership is judicially recognized, or a contract by which title is to be passed? The English courts were originally somewhat at variance on this point. In 1829, however, Parliament settled this disagreement by the passage of Lord Tenterden's Act,² which provided that the 17th Section of the Statute of Frauds should "extend to all contracts for the sale of goods of the value of ten pounds Sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

While this later statute has not been generally adopted by legislation in this country, the courts have consistently assumed that the Statutes of Fraud in the various states apply to all contracts, if truly contracts of sale, regardless of whether title has or has not passed.^{3*}

2—9 Geo. IV. Ch. 14.

3—*Atwater v. Hough*, 29 Conn. 508, 79 Am. Dec. 229, defendant had contracted to sell to plaintiff 100 sewing machines for which he had already contracted with a third party. Some of the machines were already manufactured, others were not. No title to any of them was to pass until actual delivery of possession to the plaintiff. It was held, nevertheless, that the contract was affected by the Statute. "It seems now to be settled, in accordance with the rules of just interpretation, as well as the dictates of reason and common sense, that

a contract for the sale of goods is not without the purview of the statute merely because it is executory." Accord, *Ide & Smith v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698; *Downs & Skillinger v. Ross*, 23 Wend. (N. Y.) 270, contract was for sale of existing wheat to be threshed and cleaned by seller; *Jackson v. Covert's Admr.*, 5 Wend. (N. Y.) 139; *Irwin v. Knox*, 10 Johns. (N. Y.) 364. "The statute applies as well to *executory* as to other contracts; and the decisions of the *English* courts, on this point, in *Rondeau v. Wyatt*, 2 H. Bl. 63, and in *Corper v. Elston*, 7

*See Uniform Sales Act, Section 4, (2).

Contracts to Manufacture and Sell.—The question whether a contract is a contract of *sale* or a contract to do *work* has caused far more difficulty. There is in fact no generally accepted test by which one can be distinguished from the other.

—**English Rule.**—The early English decisions, by their holdings that the Statute did not apply to *executory* contracts, necessarily confined the Statute to cases in which title could pass coincidently with the making of the contract. Contracts for goods to be manufactured were not within the statute, not expressly because they were contracts for work and labor, but because title was to pass in the future.⁴

When, subsequently, the courts decided that executory contracts, as well as those whereby title had already passed, were properly within the Statute, instead of overruling the preceding decisions they “distinguished” them. In *Rondeau v. Wyatt*⁵ it was held that the Statute did apply even though title to the goods had not passed, and Lord Loughborough, to avoid the precedent of *Towers v. Osborne*,⁶ said that case was outside of the statute “not because it was an executory contract, as it has been said, but because it was for work and labor to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable.”

This suggestion that a contract to create a chattel might be outside the statute was followed in the decision of *Groves v. Buck*,⁷ holding that the statute did not apply where the thing contracted to be sold was not in existence

Term Rep. 14, contain the sound and just construction of the statute.”

An oral contract to bequeath personal property by will, so that title would not pass until the death of the testator, has been held within the purview of the

Statute. *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666.

4—*Towers v. Osborne*, 1 Strange 506; *Clayton v. Andrews*, 4 Burrows 2101.

5—2 H. Bl. 63.

6—1 Strange, 506.

7—3 M. & S. 178 (1814).

at the time of the contract. In the following year, however, a contradictory decision was reached in *Wilks v. Atkinson*.⁸ The defendant had contracted to sell to the plaintiff a quantity of oil *to be pressed* from seed which the defendant had. This was held to be a contract of sale of goods and did not, therefore, require a revenue stamp. "A baker," said the court, "agrees to produce me a loaf tomorrow; he has not the bread, but he has the flour, and is to make it into bread, and deliver it. How often does a butcher contract to deliver meat, when he has not the meat, and the beast is not yet killed? It is out of all common sense to say this is not a contract relating to goods, wares, and merchandises."⁹

In *Clay v. Yeates*¹⁰ the contract sued on was for the printing of a book, the printer to furnish the paper. This was held not to be a contract of *sale*, but one to do *work* and *labor* and, therefore, not required to be in writing.

In *Lee v. Griffin*,¹¹ however, one of the most frequently cited cases on the point, *Clay v. Yeates* was practically overruled. The contract was for the manufacture and fitting of a set of false teeth. It was held to be a *contract for the sale of goods*, and therefore required to be in writing. Justice Blackburn laid down the general proposition that "If the contract be such that, when carried out, it would result in the sale of a chattel, the party can not sue for work and labor; but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party can not sue for goods sold and delivered." This "rule" appears to furnish a real test, i. e., if the contract will result in the transfer of title to a chattel, it is a contract of sale, regardless of the relative value of

8—6 Taunton 11 (1815).

9—*Accord, Garbutt v. Watson*, 5 Barn. & Ald. 613 (1833), sale of flour to be ground from wheat; *Smith v. Surman*, 9 Barn. & Cress.,

561 (1829), sale of timber to be made from seller's own trees.

10—1 Hurl. & Norm. 73 (1856).

11—1 Best & Smith, 272 (1861).

the chattel, as such, and of the personal element involved in its production. But, unfortunately, Blackburn destroys its apparent certainty in his next sentence, saying that the preparation by an attorney of a deed is a contract of work and labor, despite the fact that the written paper, when done, is a chattel the ownership of which is transferred from the attorney to the client. However, the rule as stated is still the English rule and gives a wide scope to the meaning of "contracts of sale" as used in the Statute.¹²

The most satisfactory statement of the English rule seems to be that there is a sale, within the Statute of Frauds, when the contract involves a transfer of title to a chattel which has an intrinsic value of its own sufficient to be recognized by the courts.

—**New York Rule.**—The courts of the United States, although recognizing that the Statute applies to executory contracts, are greatly at variance as to the distinction between a contract of sale and one for work and labor. The New York courts early took the opposite extreme from the view of the English courts. They admit that coincident passing of title is not necessary to bring a contract within the Statute, nor is even the possibility of immediate passing of title necessary. The Statute applies to contracts to pass title as well as to those by which title has been passed.¹³ But while thus overruling and discard-

12—Compounding of a prescription by a druggist and transfer of title to the compound is a "sale" and not a mere contract for "personal service." *Rex v. Wood Green Profiteering Com.* [1920], K. B. 55, 89 L. J. R. 55; furnishing of coffee in a restaurant is a "sale," *Rex v. Birmingham Profiteering Com.* [1920], K. B. 57, 89 L. J. R. 59; contract to paint a portrait held a contract for sale, *Isaacs v. Hardy*, 1 Cab. & E. 287.

13—*Irwin v. Knox*, 10 Johns. (N. Y.) 364; *Jackson v. Covert's Admrs.*, 5 Wend. (N. Y.) 139; *Downs & Skillinger v. Ross*, 23 *id.* 270; *Chamberlain v. Jones*, 52 N. Y. S. 998, contract to sell bonds not then owned by seller held a contract of sale; *Nichols v. Clark*, 81 N. Y. S. 262; *Juilliard v. Trokie*, 124 N. Y. S. 121, even though the goods be not in existence, if the seller is not himself the manufacturer.

ing the reasons stated in *Towers v. Osborne*¹⁴ and *Clayton v. Andrews*¹⁵, the New York courts do adopt the conclusions of these cases, as explained in *Rondeau v. Wyatt*.¹⁶ Thus, *Sewall v. Fitch*¹⁷ involved a contract by the defendant to sell 300 kegs of nails of a specified kind. The defendant had no nails at hand but was to manufacture them. The court held that this contract did not need to be in writing as it was not a contract for the sale of goods, but one for work and labor. Referring to *Towers v. Osborne* and *Clayton v. Andrews* the court said "those cases were rightly determined though upon a wrong principle."¹⁸

Complementary to this rule are the decisions that if the thing sold does exist at the time of the contract it is a contract of sale within the Statute despite the fact that something is still to be done to put the thing in a deliverable condition, or to make it fit for use.

Therefore the rule in New York, often called the "New York rule," appears to be that a contract, to be a contract of sale within the Statute, must be for the transfer, whether immediately or in the future, of a chattel in existence at the time of the contract.¹⁹

14—1 *Strange* 506, *ante*.

15—4 *Burrows* 2101.

16—2 *H. Bl.* 63, *ante*.

17—8 *Cow. (N. Y.)* 215 (1828).

18—*Higgins v. Murray*, 73 *N. Y.* 252, contract to make a circuit; *Gerli v. Metzger & Co.*, 99 *N. Y. S.* 858, 51 *Misc.* 46; *Myers Bros. Drug Co. v. McKinney*, 121 *N. Y. S.* 845.

19—While this is clearly the idea of the rule and is in substance the common judicial statement, it is in one application inaccurate. The fact that the seller does not himself own the goods at the time of his contract, and therefore, can not deliver immediate title, does not prevent the contract from being one of sale.

But, furthermore, unless the seller himself is to manufacture them, the courts do not inquire where he is to get them. It is immaterial that he must have them manufactured by a third person; his contract with the buyer is treated as a contract of sale. Thus it happens that even the New York courts do occasionally treat what is in reality a contract for goods not in existence as a contract of sale. *Juilliard v. Trokie*, 124 *N. Y. S.* 121; *Dow v. Schloss*, 12 *Daly* 533; *Evarts v. Thorn*, 11 *N. Y. State Rep.* 668; *Pitkin v. Noyes*, 48 *N. H.* 294; 2 *Am. Rep.* 218; cf. *Prescott v. Locke*, 51 *N. H.* 94, 12 *Am. Rep.* 55; *Palewski v. Har-*

But this rule, like its opposite English rule, leaves a modicum of uncertainty in its application. As interpreted by the courts there may be uncertainty as to just what the chattel is that a particular contract deals with. In *Kellogg v. Witherhead*²⁰ the defendant had agreed to buy "all the hams and shoulders plaintiffs would smoke" at 10c a pound. The agreement was not in writing. Obviously the question was whether it was a contract for *hams*, to be smoked by the plaintiff, or a contract for *smoked hams*. The court held that it was the former. "This was a contract for sale, not for work and labor. The plaintiffs were not to make the hams; they were to smoke them."²¹ So, in *Fitzsimmons v. Woodruff*²² the contract was for a mantel selected at the plaintiff's store, but which the plaintiff was to set up in the buyer's house with certain alterations in it. It was held a contract for sale of the mantel as it stood.

On the other hand, in *Mead v. Case*²³ the defendant had agreed to take a certain stone monument then in the plaintiff's shop, but which the plaintiff was to polish and letter with the appropriate names. This was held to be a contract to make a polished and lettered monument and therefore not a contract of sale.

—Reason of the Different Rules.—The reason for the difference between the English rule and that of New

greaves, 47 N. J. L. 334; 54 Am. Rep. 162. But compare, *Webster v. Zielly*, 52 Barb. (N. Y.) 482. This subject is discussed in the note in 19 A. & E. Ann. Cas. 1298.

20—6 Thompson & Cook (N. Y.) 525.

21—In *Bates v. Coster*, 3 Thompson & Cook (N. Y.) 580, the plaintiff offered to sell a colt. The defendant replied, "If you will castrate him, when he is well I will give you \$1,000 for him. The court held that the contract was for the existing animal, to be

gelded at seller's risk rather than for the gelded animal. *Downs v. Ross*, 23 Wend. (N. Y.) 270, wheat, to be threshed and cleaned; *Flint v. Corbitt*, 6 Daly (N. Y.) 429; *Brewster v. Taylor*, 63 N. Y. 587; sale of a wagon to be fitted with a new pole; *Seymour v. Davis*, 4 Super. Ct. (2 Sandf.) 239, cider to be refined; *Cooke v. Millard*, 65 N. Y. 352.

22—1 Thompson & Cook 3.

23—33 Barb. 202.

York is not expressed in the decisions. The opinions are founded on precedent, or original statement that a transaction is or is not a "sale," rather than on any logical reasoning as to the meaning and application of the Statute. The customary definition of a "sale" is, in effect, a transfer of the ownership of specific personal property from one person to another for a consideration valued in money. By this accepted definition, every contract for a monetary consideration to make a chattel for another, which contemplates the ultimate transfer of ownership of the chattel when made, to the one for whom it is made, is undeniably a contract of "sale". It may be primarily an agreement to do work, but since it contemplates also the transfer of ownership of the thing to be made it is, in that respect, a contract to sell the article. In the literal interpretation of the Statute, therefore, the English rule is clearly the more logical.

Moreover, as is indicated in other cases, the real purpose of the Statute is in dispute. Its preamble reads, "For prevention of many fraudulent practices commonly endeavored to be upheld by perjury and subornation of perjury." The tendency to perjury would seem to be just as great in regard to a contract whose primary purpose is the manufacture of a chattel, ultimately to be transferred to the other party, as it would be in regard to a contract whose primary and immediate purpose is the transfer of ownership. In this view of the Statute, the English rule, which brings all such contracts within the Statute, seems clearly the better.

On the other hand, Blackstone's sole comment on the Statute is that "The Statute of frauds and perjuries (was) a great and necessary security to private property."²⁴ If its purpose is to protect the ownership of property, there is justification for interpreting its use of "contract of sale" as meaning a contract whose *primary* purpose is the transfer of title of existing property.

24—Commentaries, Bk. 4, p. 440.

While the foregoing may be an explanation of the difference in the rules there is no clear evidence in the decisions that it is, and the English cases certainly are not consistent in treating the Statute as designed primarily to prevent perjury. Probably the best that can be said of any rule as to what constitutes a contract of sale within the meaning of the Statute is that "This rule may not be logical—very likely it is not, as an original proposition; but that it is the rule established by the authorities there can be no doubt."²⁵

—**Massachusetts Rule.**—The Massachusetts courts have taken a position often called "the Massachusetts rule," between the extremes of the English rule and that of New York. They follow the New York rule to the extent of holding that the primary purpose of the agreement is what makes it a contract of sale, or otherwise, and, therefore, that not all contracts are within the Statute merely because they contemplate ultimately a change of ownership of a chattel. On the other hand, Massachusetts does not go so far as New York in requiring that the chattel sold be in existence at the time of the contract. Even if the seller has contracted to manufacture the chattel, it will be a contract of sale within the Statute if it is a chattel that the seller would normally have made for the general market. Thus in *Gardner v. Joy*²⁶ the defendant had contracted to make and deliver to the plaintiff 100 boxes of candles at an agreed price. The defendant was to make the candles subsequently to the agreement. It does not positively appear that he was in the candle manufacturing business, but apparently the candles were such as were normally made for general market. The court held it to be a contract of sale.²⁷ So, also, in *Lamb*

25—*Evans v. Winona Lumber Co.*, 30 Minn. 515.

26—9 Metc. (Mass.) 177.

27—Compare, as to the difference in the New York rule, *Par-*

sons v. Loucks, 48 N. Y. 17, where a contract by a manufacturer of paper to make and deliver a certain amount of book-paper was held a contract for work and labor

v. Crafts,²⁸ a contract by a tallow manufacturer to make and deliver a quantity of refined tallow prepared from the raw material was held a contract of sale, the court saying, "Where a person stipulates for a future sale of articles which he is habitually making and which, at the time, are not made, or finished, it is essentially a contract of sale, and not a contract of labor; otherwise when the article is made pursuant to the agreement."²⁹

But, on the other hand, if the article contracted for is not an article that would normally have been made for the general market, the contract is not one of sale, even though it intends the transfer of title to the article. Thus in *Mixer v. Howarth*³⁰ the plaintiff was a manufacturer of buggies. At the time of the contract he had on hand the nearly finished body of a buggy. He contracted with the defendant to finish this body and to line it with cloth selected by the defendant. In addition to the fact that it was to be lined according to the defendant's desires, there was some evidence that the plaintiff would not have completed it at all that year except for the defendant's order. This was held to be a contract for work and labor and not a contract for sale.

This decision is not entirely reconcilable in spirit with the rule just quoted as laid down by the same judge, Chief Justice Shaw, in *Lamb v. Crafts*³¹ a few years later. A buggy would seem to be a thing habitually made by a buggy-manufacturer, unless the difference is in the mere agreement to line it with the kind of cloth the buyer wanted. The fact is that the Massachusetts rule, while even more definite than the New York rule both in statement and in the consistency with which

because the subject matter was not in existence at the time of the contract.

28—12 Metc. (Mass.) 353.

29—Compare with *Gerli v. Metzger & Co.*, 99 N. Y. S. 858, 51 Misc. 46, where a contract to furnish

"tussah"—a wound and twisted silk, made out of raw silk—was held to be a contract for work and labor.

30—21 Pick (Mass.) 205.

31—12 Metc. (Mass.) 353.

courts follow a definite idea, has, like the others, a border line of cases where the application is uncertain. As the court itself expresses the matter, "It is true that in 'the infinitely various shades of different contracts' there is some practical difficulty in disposing of the questions that arise under that (17th) section of the Statute. But we see no ground for holding that there is any uncertainty in the rule itself."³²

—Rule of Other States.—The rest of the states follow, though with an occasional inconsistency, one or another of these three rules. In some states one or the other rule has been declared effective by Statute.

Exchanges.—The distinction between a "sale" and an "exchange", which has been so clearly made by the courts in regard to statutes prohibiting the "sale" of intoxicating liquor³³, is not recognized in connection with the Statute of Frauds. A contract to pass the title to chattels is a contract of sale, within the meaning of the latter statute, regardless of whether the consideration is reckoned in terms of money or not.³⁴

32—Goddard v. Binney, 115 Mass. 450. Accord, that a contract to manufacture a chattel not such as the maker would naturally manufacture for general trade is not a contract of sale, Smalley v. Hamblin, 170 Mass. 380.

33—*Ante*, p. 3.

34—In Gorman v. Brossard, 120 Mich. 611, the contract was to deliver curb stone in consideration of the cancellation of a debt. This might well have been held to be such a consideration as would make the agreement one of sale, but the court treated it as a contract of barter and exchange and quoted with approval from Browne on the Statute of Frauds, "con-

tracts of barter are regarded, so far as the statute of frauds is concerned, as contracts of sale." Citing Dowling v. McKenney, 124 Mass. 478; Kuhus v. Gates, 96 Ind. 66, and Rutan v. Hinchman, 30 N. J. L. 255.

Bennett v. Hull, 10 Johns. (N. Y.) 364, apples in exchange for liquors; Franklin v. Matoa Gold Mining Co., 158 Fed. 941, 16 L. R. A. (n. s.) 381, contract to transfer shares of stock in return for services.

Contra, Spinney v. Hill, 81 Minn. 316, contract to transfer shares of stock in return for services.

Other Contracts.—Contracts which do not contemplate the transfer of title between the parties thereto are not contracts of sale within the Statute, even though they relate to and their subject matter involves a contract of sale between one of the parties with some one else. Thus a contract whereby two persons agree to cooperate in selling the property of one of them to a third person is not itself a contract of sale.³⁵ Likewise, a contract whereby one person authorizes another to buy goods for him, as his agent, is a contract of agency and not a contract of sale.³⁶

Mortgages of personal property, although in a certain legal usage they are said to pass the title to the mortgagee, seem to be held not to be contracts of sale within the meaning of the Statute.³⁷

A contract as part of a contract of sale, to "rescind" the sale, or to take back title in case the buyer becomes dissatisfied, is not itself a contract of sale.³⁸

35—*Bogigian v. Harsanoff*, 186 Mass. 380.

36—*Wiger v. Carr*, Wis., 11 L. R. A. (n. s.) 650; *Kutz v. Flersher*, 67 Cal. 93; *Hatch v. McBrien*, 83 Mich. 159; *Frank v. Murray*, 7 Mont. 4; *Stover v. Flack*, 41 Barb. (N. Y.) 162.

The fact that *part* of the contract relates to something else than a sale does not prevent the contract from coming within the Statute, *Atwater v. Hough*, 29 Conn. 508, 79 Am. Dec. 229; *Pitkin v. Noyes*, 48 N. H. 294.

37—*Mower v. McCarthy*, 79 Vt. 142, 7 L. R. A. (n. s.) 418, an oral mortgage was held effective, but the Statute was not referred to; *Bogigian v. Hassanoff*, 186 Mass. 380, 71 N. E. 789.

38—*Schaefer v. Strieder*, 203 Mass. 467; *Hilliard v. Weeks*, 173 Mass. 304; *Hankwitz v. Barrett*,

143 Wis. 639; *Trenholm v. Kloepper*, 88 Neb. 236.

The real reason why such a contract is not covered by the Statute is not altogether clear. The authorities just cited indicate that it is considered as not being a contract of sale. Other decisions, however, indicate that it might, as a whole, be a contract of sale primarily within the Statute, but that it has been taken out of the Statute through the buyer's receipt and acceptance of the goods. *Gurwell v. Morris*, 2 Cal. Ap. 451, 83 Pac. 578; *Armstrong v. Orlen*, 220 Mass. 112; *Freemont Carriage Co. v. Thomsen*, 65 Neb. 370.

This latter idea is strengthened by the fact that a contract to take back goods sold, standing as an entirety by itself, may be a contract of sale. *Karrer v. Madden*, 152 Wis. 646.

Subject Matter.—If it has been determined that a contract is a contract of sale, within the meaning of the Statute, the question then arises whether it is a contract for sale of the particular things specified in the Statute. The original Statute covered sales of “goods, wares or merchandises.” This is also the language of many of the state statutes. Other statutes read, “goods, chattels, or things in action.” Still others include “personal property.”

—**Incorporeal Property.**—Under the expression “goods, wares, or merchandise,” there has been considerable question as to whether anything but *corporeal* property is included. Stock certificates, promissory notes, and similar evidenciary documents of debts or rights in action, are themselves tangible things. But it has generally been held that transactions relating to such things, although in words they purport to deal with the certificate, or the note, etc., really relate to the “right” represented by the corporeal certificate, note, etc., and therefore are essentially contracts for the transfer, or whatever it may be, of the intangible right. Consequently it is in relation to contracts for the sale of shares of stock, promissory notes, etc., that the question, whether such incorporeal things are goods, wares or merchandises, has chiefly been before the courts.*

In England the rule is that such things are not goods, wares or merchandises.³⁹

In the United States, however, some statutes, as noted, specifically include “things in action,” or “personal

39—*Duncuff v. Albrecht*, 12 Sim. 189; *Bradley v. Holdsworth*, 2 M. & W. 422; *Tempest v. Kilner*, 3 C. B. 249; *Bowlby v. Bell*, 3 C. B. 284; *Watson v. Spratley*, 10 Ex. 222; *Humble v. Mitchell*, 11 E. & E. 205.

In *Knight v. Barker*, 16 M. & W. 66, a contract for sale of stock was held not exempt from the stamp tax as were contracts for sale of goods, wares and merchandise.

*See Uniform Sales Act, Section 4, 76 “Goods”.

property," either of which would include shares of stock and the like.⁴⁰ Even where the statute reads, "goods, wares and merchandises," the American courts tend to hold that so-called intangible property is included, although there is not entire harmony. In *Sprague v. Hosie*,⁴¹ the court held that savings bank stock was goods, wares or merchandise, saying, "It must be admitted that at common law shares of an incorporated company occupied much the same position as promissory notes and other mere choses in action. * * * Such shares have, however, come to be subjects of common barter and sale, are usually evidenced by certificates which, in the absence of statute provisions, operate by assignment and delivery to transfer title to the shares as between the parties. They are in this state by statute subject to levy and sale or execution. In many other respects they are treated as something more than mere choses in action. * * * That contracts for the sale and delivery of shares of stock are subject to the mischief aimed at by the statute must be admitted. We are of the opinion that reason and the weight of authority favor the conclusion that shares of stock in an incorporated company, the shares having been issued, are goods within the meaning of the statute of frauds. It follows that the parole contract for their sale was invalid."⁴²

40—*Franklin v. Matoa Gold Mining Co.*, 158 Fed. 941, 16 L. R. A. (n. s.) 381; *So. Life Ins. Co. v. Cole*, 4 Fla. 359.

41—155 Mich. 30, 19 L. R. A. (n. s.) 874.

42—Citing, *Tisdale v. Harris*, 20 Pick. (Mass.) 9; *Boardman v. Cutter*, 128 Mass. 388; *North v. Forest*, 15 Conn. 400; *Pray v. Mitchell*, 60 Me. 430; *Spear v. Bach*, 82 Wis. 192; *Johnson v. Mulvy*, 51 N. Y. 634.

"The doctrine that a contract for the sale of corporate stock is one for the sale of goods, wares and

merchandise, within the Statute of Fraud is almost unanimously recognized by the courts of this country", note in 19 L. R. A. (n. s.) 874, citing many cases. See also, *Stift v. Stiewel*, 91 Ark. 445; 18 Ann. Cas. 597; *Russell v. Betts*, 107 Ark. 629; *Korrer v. Madden*, 152 Wis. 646; *Snowstorm Co. v. Johnson*, 186 Fed. 745; *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 51 L. R. A. (n. s.) 398; *Nichols v. Clark*, 81 N. Y. S. 262; *Laundry Co. v. Whitmore*, 92 O. S. 44.

But shares are not "goods," *Rogers v. Burr*, 105 Ga. 432, 70 Am. St.

A contract by a corporation to sell its own stock was held a contract for the sale of goods, in *Hewson v. Peterman Mfg. Co.*⁴³

Contracts of subscription for corporate stocks to be issued have been held not within the Statute on the ground, not that stock was not "goods," but that the contract was not one of "sale."⁴⁴ The transfer of a promissory note has been held to be a sale of "goods."⁴⁵ So also a contract to assign a debt.⁴⁶

—**Water, Ice.**—A contract to supply water has been held a sale of goods,⁴⁷ and ice, whether cut or uncut, is personalty.⁴⁸

—**Growing Crops.**—Growing crops are in many respects treated as a part of the land by which they are produced⁴⁹ and they have been held not to be within the meaning of a statute requiring manual delivery of goods and chattels as against creditors.⁵⁰ But if they are crops which, although the product of the soil, are also the result of cultivation and annual industry, they are generally held to be personal property so far as to come within the meaning of the 17th section of the Statute.⁵¹

Rep. 50; *Webb v. Baltimore, etc., R. R. Co.*, 77 Md. 92; 39 Am. St. Rep. 396.

43—76 Wash. 600, 51 L. R. A. (n. s.) 398.

44—*Gadsden v. Lance*, 1 McMullen's Eq. (S. C.) 87, 37 Am. Dec. 548.

45—*Baldwin v. Williams*, 3 Metc. (Mass.) 365.

46—*French v. Schoonmaker*, 69 N. J. L. 6.

47—*Mayor v. Town of Harrison*, 71 N. J. L. 69; *Canavan v. City of Mechanicville*, 229 N. Y. 473, 128 N. E. 882.

48—*Higgins v. Kusterer*, 41 Mich. 318, 32 Am. Rep. 160.

49—They pass, though not specifically mentioned, by a deed to the land. *Kammrath v. Kidd*, 89 Minn. 380, 99 Am. St. 603; *Gibbons v. Dillingham*, 10 Ark. 9; *Turner v. Cool*, 23 Ind. 56; *Smith v. Leighton*, 38 Kan. 544; *Wooton v. White*, 90 Md. 64; *Jones v. Adams*, 37 Ore. 473; *McIlvain v. Harris*, 20 Mo. 457.

Contra, *Aldrich v. Bank of Ohio*, 64 Neb. 276, 97 Am. St. 643.

50—*Bernal v. Havius*, 17 Cal. 541, 79 Am. Dec. 147; *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340.

51—*Mighell v. Dougherty*, 86 Ia.

—**Trees, etc.**—Growing things, such as trees and grass, which are naturally produced by the soil, and things which by attachment have become legally part of the soil, are the subject of very much confusion in the cases. Section 4 of the Statute of Frauds requires sales of land, or of an interest in land, to be in writing; so that growing things are necessarily covered by one section or the other. The two sections do differ, however, in their requirements; the chief distinction being that under section 17 a writing is not necessary if there has been payment of part of the price, or if part of the goods have been received and accepted. Section 4 applies to every contract; section 17 only to those involving a certain value. It therefore makes a material difference whether the contract comes under one section or the other.

In respect to matters other than the Statute of Frauds trees, grass and fixtures are considered as real estate so long as they are a part of the land—that is to say, while they are still growing in or legally attached to the soil. But when severed from the soil they at once become personal property in and of themselves. Trees and grass are subjects of sale irrespective of the land, whether they are still growing in it or not.⁵²

Logically, therefore, a sale of trees, or grass, would seem to be a sale of real estate, or a sale of personal property, according as it contemplates a *transfer of title* to the trees *before* or *after severance*. That is, a trans-

480, 41 Am. St. 511; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173, *dictum*.

Growing peaches, to be picked by the buyer, were held not to be an interest in land in *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591.

52—"It is elementary knowledge that growing timber forms a part of the realty, and, like any other part of the estate, may be sepa-

rated from the rest by express reservation or grant; and even when so separated it retains its distinctive character as an incident of real property so long as it remains uncut; but when cut and severed from the soil, it becomes personal property, to which title may be acquired, as in the case of other chattels * * *". *Emerson v. Shores*, 95 Me. 237, 85 Am. St. 404; *White v. Foster*, 102 Mass. 378.

fer of title in unsevered trees should properly be a sale of a part of the realty; a transfer of title which is not to take place until after the trees have been severed, a sale of personalty. The fact that at the time of making the *contract* the trees are uncut should not logically determine the character of the contract. A sale of false teeth to be made is in no sense a sale of the porcelain and rubber out of which they are to be made; it is a sale of the teeth, or else a mere contract for work and labor. So, a contract for the transfer of title to *severed* trees is not properly a contract for the sale of growing trees out of which the severed trees are to be made.

The whole matter, however, is further complicated by a preliminary inquiry. Does the Statute, in speaking of contracts for the sale of personalty, mean the sale of that which is personalty at the time the contract is entered into, or does it mean the sale of that which will be personalty at the time the title is passed? There is no definite answer to this in the decisions. The broadest analogies indicate the latter alternative. But, at least, an understanding of this problem is a help in understanding the decisions.

The intention of the parties as to whether there should vest in the buyer enforceable legal rights in and to the trees before they are cut or after they are cut, should be determinative of whether they have contemplated giving the buyer an interest in real property or in personal property. And the intention of the parties in this respect would seem to be indicated by whether the buyer is expected to enter and cut the trees—in which case they must have contemplated that he should have rights in the growing trees—or whether the seller is to cut them before the buyer can act in regard to them.

There is some support for this theoretical test in the decisions—although it is nowhere expressed—but not a great deal. On the other hand, a distinction, or test, occasionally expressed, but not more precisely followed, is

that if the contract contemplates an immediate severance of the trees it is a sale of personal property, and covered by the 17th section of the Statute, while if it contemplates that the trees shall be left to grow still further it is a sale of an interest in realty.

The truth is that courts have neither expressed nor intuitively followed any consistent rule in regard to such contracts. As one court expresses the matter, "Whether the sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several states of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England particularly have varied widely in their holdings on the subject."⁵³

53—Hirth v. Graham, 50 O. S. 57, 40 Am. St. 641. No attempt is made here to cite the holdings of particular states, but only a few representative ones on either side. Held, contract for an interest in land: Seymour v. Cuchway, 100 Wis. 580, 69 Am. St. 957, buyer to cut, but no emphasis laid on that fact; Hirth v. Graham, 50 O. S. 57, 40 Am. St. 641, buyer to cut; Owens v. Lewis, 46 Ind. 488, 15 Am. Rep. 295, buyer to cut; Cool v. Peters, etc. Co., 87 Ind. 531, buyer to cut; Slocum v. Seymour, 36 N. J. L. 138, 13 Am. Rep. 432, buyer to cut; Kingsley v. Holbrook, 45 N. H. 313, *id.*; Harrell v. Miller, 35 Miss. 700, 72 Am. Dec. 154, *id.*; Mizell v. Burnett, 4 Jones (N. C.) 249, 69 Am. Dec. 744, *id.*; Fluharty v. Mills, 49 W. Va. 446, *id.*; Ala. Mineral Land Co. v. Jackson, 121 Ala. 172, 77 Am. St. 46.

Held not an interest in land:

Emerson v. Shores, 95 Me. 237, 85 Am. St. 404, buyer was to cut; Marshall v. Green, 1 C. P. Div. 35, *id.*; White v. Foster, 102 Mass. 378, unless by deed; Ryasse v. Reese, 4 Metc. (Mass.) 372, 83 Am. Dec. 481, because "in contemplation of immediate separation" by the buyer; Smith v. Bryan, 5 Md. 141, 59 Am. Dec. 104, buyer to cut; Leonard v. Medford, 85 Md. 666, 37 L. R. A. 449, on ground of immediate separation by buyer; Robbins v. Farwell, 193 Pa. 37, *idem.*; Fish v. Capwell, 18 R. I. 667, 49 Am. St. 807; Turner v. Planter's Lumber Co., 92 Miss. 767, 131 Am. St. 552, seller to cut; Killmore v. Howlett, 48 N. Y. S. 569, seller to cut.

Sale of grass, held interest in land: Smith v. Leighton, 39 Kan. 544, 5 Am. St. 778, buyer to cut; Ross v. Cook, 71 Kan. 117, buyer to cut; Kirkeby v. Erickson, 90

Price.—The original statute did not apply to every sale of goods, but only to those contracts in which the price should be 10 pounds Sterling or upwards. The majority of statutes enacted in this country apply only when the price is \$50 or more, but others vary as to the amount, from that of Florida, which applies to every contract, to that of Ohio, which applies only when the price is \$2,500 or more.

To bring a contract within the Statute it is not essential that the price of any one thing be so great as the amount fixed by the Statute, or that a price so great as that amount be expressly stated in the agreement. It is sufficient if the amount required to be paid by the terms of any one contract is greater than the amount stated in the Statute. As illustration,⁵⁴ one Allard showed samples of women's hats to Greasert and told him the price per dozen, or per piece, thereof and from these the latter made up an order for goods. The procedure was that Allard showed each sample in turn and Greasert either passed it by or ordered one or more like it. No one hat was priced at more than \$3.00 and no type of hat was ordered in quantity of more than \$24.00 worth. The sum total of the order came to more than the amount named in the Statute. The court held, on trial of the case, that the transaction did not constitute a series of contracts for each hat or each type of hat, but that the entire transaction was one single contract for all the hats at the total price.⁵⁵

Minn. 299, 101 Am. St. 411, buyer to cut; Crosby v. Wadsworth, 6 East 601.

Not an interest in land. Kreisle v. Wilson, — Tex. —, 148 S. W. 1132, buyer to cut.

54—Allard v. Greasert, 61 N. Y. 1; citing and following Baldey v. Parker, 2 B. & C. 41.

55—Accord, Cooke v. Millard, 65 N. Y. 352, order for various kinds

and sizes of lumber given orally at one time; Gilman v. Hill, 36 N. H. 311; Standard Wall Paper Co. v. Towns, 72 N. H. 324; Brown v. Snider, 126 Mich. 198, "The authorities cited undoubtedly establish the proposition that because a separate price was agreed upon for each article of merchandise, or because some of the articles purchased were to be delivered at one

Even if the total amount to be paid under the contract is not known at the time it is entered into, the agreement must be in writing if events ultimately fix the price at more than the statutory amount. Thus, a contract for the sale of all flax to be raised on certain land at \$5.00 per ton was held to need a writing in view of the fact that over 20 tons were actually raised.⁵⁶

The great difficulty in these cases is to know when a transaction constitutes one single contract and when it amounts to several related, but distinct, contracts. There appear to be no decisions bearing upon that point where the amount of the price has been the one particular point involved. There are, however, a number of illuminating opinions upon the matter of single or several contracts raised by the question of what delivery and acceptance will suffice to make a contract enforceable despite absence of a writing. To avoid duplication of discussion they are not cited in this place, but reference is made to the discussion under that topic.

2. MEMORANDUM REQUIRED BY THE STATUTE,

The writing required by the Statute is some note or memorandum of the bargain, signed by the parties to be charged or their agents thereunto lawfully authorized.

Character of the Memorandum.—It is immaterial when the writing is made, so long as it represents the terms of the real agreement.⁵⁷

No formality in the written instrument is required. Any kind of a writing which sufficiently sets out the terms of the contract and is properly signed is sufficient.

time and some at another, it would not follow that the transaction was not a single transaction, constituting but one contract."

56—Brown v. Sanborn, 21 Minn. 402; Bowman v. Conn. 8 Ind. 58,

following Watts v. Friend, 10 B. & C. 446; Carpenter v. Galloway, 73 Ind. 418.

57—Emery v. Boston Terminal Co., 178 Mass. 172, 86 Am. St. 473, *dictum*.

Even a telegram is sufficient as a writing—although the original copy, signed by the party in person, is not produced.⁵⁸

Purpose of the Memorandum.—The purpose for which the writing was made is likewise immaterial. Thus, a memorandum made by a party solely for his own use and never shown to the other party is sufficient if the other party learns of it in time to compel its production in evidence. “There is no evidence,” said the court in one case,⁵⁹ “that this note was ever seen by the appellee (plaintiff) or even its existence known to him until the trial; and it certainly never was delivered to him, or went out of the possession of the appellants, until produced in court. * * * The Statute was passed * * * to prevent the defendant from suffering loss, upon the parole testimony of either a perjured or mistaken witness. * * * It made the defendant only liable when a note or memorandum of the bargain signed by himself was produced at the trial. If produced from the defendant’s own custody, it guards against the mischief that the Statute was passed to prevent, just as well as if produced from the custody of the plaintiff.”⁶⁰

Even a letter stating that the writer will not be bound by his contract is sufficient if it incidentally sets out the terms of the contract.⁶¹ But of course a letter denying that any contract was ever entered into would not be a memorandum of a contract even though it might set out the terms of an alleged contract.⁶²

58—*Brewer v. Harst-Lachmund Co.*, 127 Cal. 240, 50 L. R. A. 240, annotated; *Dunning v. Roberts*, 35 Barb. (N. Y.) 463.

Minute book, *The Argus Co. v. Mayor, etc.*, 55 N. Y. 495.

Letter by defendant to a third person, *Marks v. Cowdin*, 226 N. Y. 138.

59—*Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343.

60—*Accord, The Argus Co. v. Mayor, etc.*, 55 N. Y. 495, minutes of a meeting; *Johnson v. Dodgson*, 2 M. & W. 653.

61—*Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343.

62—*Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 55 Am. St. 680.

Signature.—The Statute requires that the memorandum be signed by the party to be charged or by his agent. Even a memorandum made entirely in the handwriting of the party to be charged is not sufficient if not signed by him.⁶³

The signature, however, need not be at the end of the memorandum.⁶⁴

Neither need it be the full name of the party to be charged. The function of the signature required by the Statute is undoubtedly for the verification of the writing and "signed" has therefore been given its broad literal meaning, to make a distinguishing mark, or manifestation. "It is hardly necessary to add that the signature is valid and binding, though made with the initials of the party only."⁶⁵ A letter signed with only the Christian name of the writer has been held sufficient as a written memorandum.⁶⁶

63—*Selby v. Selby*, 3 Meriv. 2; *Watson v. Winston*, (Tex.) 43 S. W. 852; *Copehart v. Hale*, 6 W. Va. 547; *Newby v. Rogers*, 40 Ind. 9, even a writing signed by the plaintiff and produced from the custody of the defendant is not sufficient. "When the statute speaks of 'the party to be charged' it must be understood to mean the defendant to the action. The note or memorandum must be signed by him."

It is not necessary that it be signed by both parties, *Newby v. Rogers*, 40 Ind. 9; *First Presbyterian Church v. Swanson*, 100 Ill. Ap. 39; *Bowers v. Whitney*, 88 Minn. 168; *Bristol v. Mente*, 80 N. Y. S. 52, 178 N. Y. 599; *Dennis Simmons Co. v. Corey*, 140 N. C. 462, 6 L. R. A. (n. s.) 468; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Knapp v. Beach*, 52 Ind. Ap. 573.

Contra, *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708.

64—*Drury v. Young*, 50 Md. 542, 42 Am. Rep. 343; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286.

But the statutes of some states require the memorandum to be "subscribed."

65—*Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 446.

66—*Walker v. Walker*, 175 Mass. 349.

Cf. *Zann v. Haller*, 71 Ind. 136, 36 Am. Rep. 193.

Defendant's "Mark" is sufficient. *Foye v. Patch*, 132 Mass. 405; *Symbols*, *Brown v. Butcher's Bk.*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755, indorsement on a negotiable instrument.

The character and medium with which the signing is done is also not material. Thus it is a sufficient signing although the signature be made with a pencil,⁶⁷ or by means of a rubber stamp.⁶⁸

As the purpose of the signed writing is to show that the particular contract alleged was made by the particular defendant it is fair to assume that the primary purpose of the signature is to connect the defendant with the writing. Theoretically, therefore, the signature should have some characteristic as a signature—distinct from a name—by which to identify the signer. It should be his own chirography, for instance, or that characteristic of his agent. Practically, however, it is not at all essential that the signature be characteristic of the defendant beyond the fact that it is his name. A signature made by a rubber stamp, for instance, even though affixed by an agent, is held to supply the requirements of the Statute, without any indication in the decisions that it should be a facsimile of the party's own handwriting.⁶⁹ Likewise, a name printed by means of a typewriter has been held a sufficient "signing" of the instrument, although it was certainly in no way inherently characteristic of the party to be charged.⁷⁰ Courts have even gone so far as to hold that the name of a party *printed* on a paper prior to the making of the contract afterward evidenced by the paper is a sufficient "signing."⁷¹ In

67—Merritt v. Clason, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; 14 Johns. (N. Y.) 484; Myers v. Vanderbelt, 84 Pa. 510.

68—Streff v. Colteaux, 64 Ill. Ap. 179; Deep River Bank's App., 73 Conn. 341.

69—Deep River Bank's App., 73 Conn. 341; Streff v. Colteaux, 64 Ill. Ap. 179, "It is ordinarily the act of making a paper one's own that is important, rather than the manner of so doing."

70—Landecker v. Bank, 130 N.

Y. S. 780; Garton Toy Co. v. Buswell Lumber Co., 150 Wis. 341.

71—Goldowitz v. Kupfer & Co., 141 N. Y. 531, name printed at bottom of a circular containing the terms of a contract alleged to have been made afterward; Hamilton v. State, 103 Ind. 96, name of prosecuting attorney printed at bottom of a blank form on which an indictment was later written held a signature.

The fact that the signature was made *before* the contract was

*Drury v. Young*⁷² a memorandum was held to be duly signed by the defendant although the instrument had never been delivered to the plaintiff and the defendant's name appeared on it only in the form of a printed letter-head, at the top of the paper.

These cases, although undoubtedly accepted as authority, are scarcely within the rule laid down in *McMillen v. Terrell*,⁷³ as follows: "The law does not prescribe the particular place where the obligor's name must be placed; it may be at the beginning, or in the body, at the close or perhaps on the margin of the instrument; but wherever placed, it must be done with the intention of thereby executing it as the obligation of the party so signing it. If the signature is placed at the close, at the ordinary place of signature, the inference is that it was so placed as the final execution of the instrument. This inference, however, does not necessarily arise where the name is found at the commencement or in the body. In such case there should be some evidence, either in the form of the instrument or the circumstances attending the signature, showing that it was the intention of the party thereby to execute it. * * * The Statute is plain and unequivocal, and should not be evaded by judicial refinement, but should be so administered as to subserve the purpose for which it was enacted."

—**Signing by Agent.**—The signing may be done by an agent of the party, as is indicated by many of the cases already discussed. This is in accord with the specific provision of the Statute. It ordinarily appears that the party's own name was signed by the agent—as, for instance, in using a rubber stamp—and such signing is effective whether the agent appends also his own name as agent or not. But a signing by the agent of his own

drawn has been held to be no bar to its effectiveness. *Ulen v. Kittedge*, 7 Mass. 233; *Underwood v. Hossack*, 38 Ill. 208.

But *contra*, *Hodgkins v. Bond*, 1 N. H. 284.

72—50 Md. 542, 42 Am. Rep. 343.

73—23 Ind. 163.

name only, without writing that of his principal, is sufficient to charge the principal if he be otherwise shown by the contract as the person concerned.⁷⁴

The party claiming under the contract, however, can not himself be an agent for the party to be charged so as to sign for the latter.⁷⁵

Separate Papers.—When the memorandum consists of several separate pieces of paper it is not essential that they all be signed by the party to be charged. It is sufficient if the “memorandum” be signed.

That the “memorandum” may consist of several separate and distinct documents is well settled. There must be some connection between the various unsigned papers and the one on which the signature appears, but this connection may be either physical or through relation of the contents.

As a physical connection it need not be a fixed one. A letter and the envelope in which it was sent, for instance, are sufficiently connected to be used together as constituting the memorandum.⁷⁶ In another case two documents, neither of which by itself was a sufficient memorandum, were read in connection one with the other

74—Haskell v. Tukesbury, 92 Me. 551, 69 Am. St. 529, quoting from Union Bk. v. Coster, 3 N. Y. 203, 53 Am. Dec. 280, “The provisions of the Statute are complied with if the names of competent contracting parties appear in the writing, and, if the party be an agent, it is not necessary that the name of the principal shall be disclosed in the writing.” Kingsley v. Siebrecht, 92 Me. 23, 69 Am. St. 486; White v. Dahlquist Mfg. Co., 179 Mass. 427; Brodhead v. Reinbold, 200 Pa. 618, 86 Am. St. 735.

An auctioneer may be agent of both parties, so far as signing the memorandum is concerned. John-

son v. Buck, 35 N. J. 338, 10 Am. Rep. 243; but inasmuch as one party to the contract can not sign as agent of the other party so as to satisfy the statute, an auctioneer who has himself an interest in the sale can not sign as agent of the other party, Bent v. Cobb, 9 Gray (Mass.) 397, 69 Am. Dec. 295; Tull v. David, 45 Mo. 445, 100 Am. Dec. 385.

75—Witson v. Lewiston Mill Co., 150 N. Y. 314, 55 Am. St. 680; Johnson v. Buck, 35 N. J. 338, 10 Am. Rep. 243.

76—Pearce v. Gardner [1897] 1 Q. B. 688.

because they had been pinned together at the time of sale.⁷⁷ A writing on an unsigned leaf of a book was treated as a sufficient memorandum because of the signature on the leather folder in which it was kept.⁷⁸

—**Relation of Papers.**—When separate documents are allowed to be read together because of the relation of the subject matter, there is generally a specific reference in the signed paper to the unsigned one. This reference, however, need not be specific nor even apparent from a mere reading of the document. It is sufficient if there is in fact a reference when the meaning of the document is explained.⁷⁹

Thus, in *Beckwith v. Talbot*⁸⁰ a written agreement had been signed by the plaintiff but not by the defendant. But the defendant had signed certain letters in which he several times referred to “the agreement.” The court held that there was a memorandum signed by the defendant, saying, “What agreement could he possibly refer to but the only one which, so far as appears, was ever made. * * * It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the Statute of Frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parole proof. But the rule is not absolute. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where

77—*Tallman v. Franklin*, 14 N. Y. 587.

78—*Jones v. Joyner*, 82 L. T. (n. s.) 768. See also *Jelks v. Barrett*, 52 Miss. 315. But compare, *Wilstock v. Heyd*, 122 Ind. 574.

79—*Willis v. Ellis*, 98 Miss. 197; *Albion Lumber Co. v. Lowell*, 20

Cal. Ap. 782; *Leesley Bros. v. Fruit Co.*, 162 Mo. Ap. 195, no reference by one to the other at all. *Allen v. Burnett*, 92 S. C. 95; *Poel v. Brunswick, etc. Co.*, 144 N. Y. S. 725, even though the second one purports to be a repudiation of the other.

80—95 U. S. 289.

there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud.’⁸¹

But to the extent that a reference is necessary, the reference must appear from the document itself. The fact that they do refer to the same subject matter and are in fact supplementary can not be shown by extraneous evidence; the relationship must appear from the face of the documents. “If it be necessary to adduce parole evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the signed paper to show a reference to, or connection with the unsigned papers, then the several papers taken together do not constitute a memorandum in writing of the bargain, so as to satisfy the statute.”⁸²

This latter statement and the decisions in accord with it are not precisely in harmony with the decision in *Beckwith v. Talbot*, *supra*. The difference, however, seems to be less in the law than in the application. The cases are agreed that separate documents can not be used as one memorandum if extraneous evidence is necessary to show their connection.⁸³ On the other hand, it is settled that parole evidence may be received as a means of interpretation of the expressions used in the writing. If, when so explained and interpreted, the language of one document clearly relates to another, that other may be used in connection with it, even though the language when unexplained shows no apparent connection. This is the doctrine of *Beckwith v. Talbot*. The court allowed the phrase “the agreement” to be explained by parole evidence. When so explained, it clearly related to the other paper, in the opinion of the court.⁸⁴ The conflict

81—*Ryan v. United States*, 136 U. S. 68; *Little v. Dougherty*, 11 Colo. 103; *Coe v. Tough*, 116 N. Y. 273; *Marks v. Cowdin*, 226 N. Y. 138.

82—*North v. Mendel*, 73 Ga. 400, 54 Am. Rep. 879; *Smith v. Jones*,

66 Ga. 338, 42 Am. Rep. 72.

83—*Johnson v. Buck*, 35 N. J. 338, 10 Am. Rep. 243; *Thayer v. Luce*, 22 O. S. 62.

84—*Wilkinson v. Taylor Mfg. Co.*, 67 Miss. 231; *Bauman v. James*, 3 Ch. 508.

between various decisions is largely due to the lack of any standard as to when the relationship is *sufficiently* indicated by the language of instruments.

There are many decisions, however, to the effect that no reference by one document to the other is necessary at all if from their contents it can be said that they obviously relate to the same subject matter. In *Brewer v. Horst-Lachmund Co.*⁸⁵ the only writing was in the form of two telegrams, neither of which referred to the other and neither of which alone was a sufficient memorandum. The court allowed them to be used together because "on their face, the last one was sent to the plaintiff in response to the first." Similarly, in *Lerned v. Wannemacher*⁸⁶ there were two identical written statements of a sale of coal. Each one showed all the terms of the contract, except the names of the parties. One paper was signed by the plaintiff and the other by the defendant. Thus one paper showed the name of the seller, the other the name of the buyer. There was no reference in either to the other. Nevertheless the court allowed the two to be read together, whereby the entire contract was shown.⁸⁷

Contents of Memorandum.—As to the contents of the memorandum, the law is more simple and definite than the apparent confusion in its application indicates. The rule is simply, that the memorandum must show the terms of the contract. It is not sufficient for the memorandum to show that *some* contract was entered into; it must show *what that contract was*.⁸⁸

85—127 Cal. 643, 50 L. R. A. 240.

86—9 Allen (Mass.) 412.

87—*Leesley Bros. v. Fruit Co.*, 162 Mo. Ap. 195; *Peyck Bros. v. Ahrens*, 98 Mo. Ap. 456, "If some only of the writings be signed, reference must specifically be made therein to those which are not so signed. But if each of the writings be so signed, such reference

to the other need not be made, if, by inspection and comparison, it appears that they severally relate to, and form a part of, the same transaction." *Welsh v. Brainerd*, 95 Minn. 234; *Gaines v. McAdam*, 79 Ill. Ap. 201; *Crystal Palace Flouring Co. v. Butterfield*, 15 Colo. Ap. 246.

88—"The note or memorandum

—**Names of Parties.**—The parties involved in the contract must be shown by the writing, else it does not of itself show a contract. "It takes two parties to make a contract; and a writing which names only one party, and does not in any manner indicate who the other party is, does not set forth a contract. It is well established that where the statute requires the contract to be in writing there can be no binding contract unless both parties thereto are named in the writing, or so described therein as that they may be identified."⁸⁹

—**Consideration.**—For the same reason, the consideration must be shown. Without consideration there can be no contract, and a writing, therefore, which states no consideration states no contract. It does not matter that there was in fact a consideration, any more than it matters that there was in fact a contract. The writing must do more than merely indicate that there was a contract; it must show what that contract was. However we may define "contract" in other relations, in this connection the "contract" is not the promise alone; it is the promise and the consideration. Hence, a writing which does not show the consideration as well as the promise does not show the contract and is insufficient to satisfy the Statute.⁹⁰

* * * must disclose with substantial accuracy every fact material to constitute a contract of bargain and sale. It is therefore essential that such a note or memorandum shall contain within itself a description of the property agreed to be sold by which it can be known or identified, of the price to be paid for it, of the party who sells it, and of the party who buys it." *Am. Iron & Steel Co. v. Midland Steel Co.*, 101 Fed. 200.

89—*Ogelesby Co. v. Williams Co.*, 112 Ga. 359; *Darnell v. Laferty*, 113 Mo. Ap. 282; *Kingsley*

v. Siebrecht, 92 Me. 23, 69 Am. St. 486. If the signer appears as an agent only, with no personal liability, the principal's name must also appear somewhere; the memorandum must name someone who is liable, *Langstroth v. J. C. Turner Co.*, 148 N. Y. S. 224.

90—*Rains v. Patton*, 191 Ala. 349; *Kemensky v. Chapin*, 193 Mass. 500; *Am. Iron & Steel Co. v. Midland Steel Co.*, 101 Fed. 200; *Carter v. Timber Co.*, 184 Mo. Ap. 523, "In determining the sufficiency of a writing to evidence a contract within the Statute of Frauds

The memorandum need not state anything more than was included in the contract itself. The place or time of delivery, for instance, are not essential to be determined upon in an oral contract. A contract in which that matter has been quite ignored by the parties is quite enforceable. Therefore, if such matters have not been included in the contract the memorandum need not contain anything in regard to them.⁹¹

But, on the other hand, it is not sufficient that the memorandum merely show *a* contract. It must show *the* contract on which suit is brought. And, inasmuch as the party sued can use oral evidence to disprove the making of the contract as alleged in the suit, this means that the memorandum must show *the* contract actually made.⁹²

Accordingly, if terms as to time of delivery and the like, although not necessary to a valid contract, have in fact been agreed upon, the memorandum is not sufficient unless it does show such terms.⁹³

there are three essential and necessary ingredients. (1) the parties, (2) the subject matter, and (3) the consideration or price. Where the writing lacks any of these essential elements there is no enforceable contract." *Booth v. A. Levy, etc. Co.*, 21 Cal. Ap. 427; *Glasgow Milling Co. v. Burgher*, 122 Mo. Ap. 14; *Rigby v. Gaymon*, 95 S. C. 489.

91—*Willis v. Ellis*, 98 Miss. 197; *Crosby v. Bouchard*, 82 Vt. 66; *Darnell v. Lafferty*, 113 Mo. Ap. 282. If the contract itself gives the buyer a choice, the memorandum need not be more explicit, *Am. Iron & Steel Co. v. Midland Steel Co.*, 101 Fed. 200. If price is left to future determination, memorandum need not show more. *Booth v. A. Levy etc. Co.*, 21 Cal. Ap. 427.

92—"It is not sufficient that the note or memorandum may express the terms of a contract. It is essential that it shall completely evidence the contract which the parties made. If instead of proving the existence of that contract, it * * * evidenced a contract in terms and conditions different from that which the parties entered into, it fails to comply with the statute." *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310.

"It becomes necessary then to examine and ascertain what are the essential terms of this contract before we can pass upon the question of whether the memorandum is sufficient to assert itself without parole evidence." *Darnell v. Lafferty*, 113 Mo. Ap. 282.

93—*Arky v. Commission Co.*, 185 Mo. Ap. 241; *Crosby v. Bouchard*, 82 Vt. 66.

—**Subject Matter of the Contract.**—The promise of the seller is the consideration for the promise of the buyer. Therefore, under the foregoing rule, the seller's promise as well as that of the buyer must appear in the writing. And as the seller's promise is to convey title to some thing, what that thing is must be shown by the memorandum.⁹⁴

Self-Explanation of the Memorandum.—None of these essentials, however, need be stated with such fullness and precision as to be at once intelligible to any reader. A memorandum written in Russian would undoubtedly be sufficient though not intelligible to the average American. One phrased in the technical idiom of a particular trade would suffice if accurately translatable to a court, though unintelligible to the unlearned reader. Similarly, a memorandum which has a precise and definite meaning to one who is acquainted with the facts surrounding the transaction is sufficient, even though it be unintelligible to one unfamiliar with the circumstances. "It is always permissible to show the surroundings and circumstances of the contract and it is sufficient, as against the Statute of Frauds, that, after the court is put in the same position as the parties themselves, the terms and subject matter of the contract are made certain."⁹⁵

94—Carter v. Timber Co., 134 Mo. Ap. 523.

95—Carter v. Timber Co., 134 Mo. Ap. 523.

The description of the subject matter need not be explicit on the face of the memorandum if it can be made so by a showing of the circumstances. Thus, a "memorandum of sale of stock of W. C. C." was held sufficient when interpreted through extrinsic evidence to mean that stock of W. C. C. which the seller had authority to sell, Willett v. Smith, 214 Mass.

494. Accord, Bowers v. Ocean Accident Co., 97 N. Y. S. 485, Affd. 187 N. Y. 561; Flash v. Rossiter, 102 N. Y. S. 449; Bank v. Securities Co., 141 Mo. Ap. 524; Moses Co. v. Stack-Gibbs Co., 56 Wash. 529; Haskell v. Tukesbury, 92 Me. 551, 69 Am. St. 529; In Darnell v. Lafferty, 113 Mo. Ap. 282, the court said, "It must be remembered that however minute and precise in the matter of detail a description may be, that in the last analysis, resort must be had to parole; that the last and final step in all transactions of

3. SATISFACTION OF THE STATUTE BY ACCEPTANCE AND RECEIPT OF THE GOODS

If there is no memorandum, the Statute nevertheless allows the contract to be enforced if "the buyer shall accept part of the goods so sold and actually receive the same."

"Receive" and "Accept" Do Not Relate to Title.—

In connection with this proposition it should be borne in mind that the Statute of Frauds has nothing to do directly with title. The fact that a buyer has title will avail him little if, because of the Statute, he can not prove the contract through which he claims it. On the other hand, the Statute may preclude his proving even a wholly executory contract to sell, since, as we have seen, the Statute is held to apply to executory contracts as well as to executed ones. Therefore, cases involving "delivery and

this kind is the process of identification, and, if perchance a controversy arise, resort must eventually be had to parole evidence to fit even the most detailed and minute description to the thing described. * * * Under the rule above stated, the language employed, 'ten head of cows and heifers' being applicable to several head of cows and to several head of heifers, it is competent to show by parole what cows and what heifers were referred to."

The same rule of explanation through extrinsic evidence applies to the other parts of the memorandum. *Willet v. Smith*, 214 Mass. 494; *Booth v. A. Levy etc. Co.*, 21 Cal. Ap. 427.

The names of the parties need not be used if they are so described that knowledge of the circumstances makes them definite. *Darnell v. Lafferty*, 113 Mo. Ap. 282;

Allen v. Burnett, 92 S. C. 95. In *Kingsley v. Siebrecht*, 92 Me. 23, 69 Am. St. 486, the court said, quoting from an English case, "Parole evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, or whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If sued for the price, and his identity is made out, the contract is not varied by appearing to have been made by him in a name not his own." *Haskell v. Tukesbury*, 92 Me. 551, 69 Am. St. 529, "Friend George" held sufficient; *White v. Dahlquist Mfg. Co.*, 179 Mass. 427.

acceptance'' as bearing upon the question of whether title has passed or not have no necessary relation to the matter of receipt, or delivery, and acceptance as affecting the Statute.

''Receive'' as used in the Statute refers to possession, not merely to title. Passing of title, sometimes called delivery, or receipt, of title, is not enough to satisfy the Statute.⁹⁶

Similarly, ''accept'' relates to the physical thing and not to the title.* An excellent illustration is found in *Riley v. Bancroft's Est.*⁹⁷ This involved a sale of liquor by the plaintiff, who did business in Omaha, to the defendant, who lived in Springfield. The plaintiff was licensed to sell liquor in Omaha, but not in Springfield. The liquor was delivered to a carrier in Omaha in such a way that, by the usual rules, title would have passed there. But, as discussed hereafter, delivery to a carrier and acceptance by it do not satisfy the Statute. The only acceptance which would suffice to take the contract out of the Statute occurred in Springfield. The defendant contended that title did not pass until such acceptance and that the sale was therefore void, as the seller had no license to sell in Springfield. The court, however, decided in favor of the plaintiff on the ground that *title* could be accepted by the buyer, and was so accepted in Omaha, even though there was not such acceptance of the *goods* as was required by the statute until they reached Springfield.⁹⁸

96—*Rodgers v. Jones*, 129 Mass. 420. See also the cases cited in the following notes.

97—51 Neb. 864.

98—Occasional courts fall into confusion on this point, as for instance in *Nugent v. Beakes*, 54 N. Y. S. 486. After delivery of goods such as contracted for to a carrier, but before delivery to the buyer,

a creditor of the seller levied upon them. The court held that *title* could not pass until there had been such delivery to the buyer and acceptance by him as would satisfy the Statute of Frauds. Such a holding was obviously in conflict with the conclusive authorities, already cited, to the effect that *title* does pass on de-

*See Uniform Sales Act, Section 4, (3).

Conversely, there may be such receipt and acceptance of the physical thing as will satisfy the Statute without any passing of title at all. Thus, in *Pinkham v. Mattox*,⁹⁹ the contract provided expressly that the title should not pass upon delivery to the buyer, but should remain in the seller until payment of the price. The buyer received possession of the goods and kept them without objection. Later, on being sued for the price, the buyer set up the Statute and contended that, as he had never received the goods *as owner*, there was no acceptance within the meaning of the Statute. This contention the court overruled and held that, despite the retention of title in the seller, there was such acceptance as would satisfy the Statute.¹⁰⁰

Change of Position.—Although “receive” as used in the Statute refers to delivery and receipt of the thing itself, rather than to the title, such delivery and receipt do not necessarily require a change of physical position. There is some slight suggestion that not even a change of physical possession is necessary.¹⁰¹

livery to a carrier. The result itself was sound, however, because the contract involved *expressly* provided that title should not pass until after an actual inspection by the buyer.

In another case, *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316, counsel attempted to support the proposition that physical delivery was not necessary to take the case out of the Statute by citing *Dewett v. Warner*, 12 Mass. 311, 7 Am. Dec. 74, in which it had been held merely that physical delivery was not essential to the passing of title. The court, however, recognized the difference in requirements.

99—53 N. H. 600.

100—Acceptance of a part will take the whole contract out of the

statute although title to all has not passed. *McKnight v. Dunlap*, 5 N. Y. 537.

101—*Chaplin v. Rogers*, 1 East 192, as the opinion is read in the light of the facts. *Devine v. Warner*, 76 Conn. 229; *Devine v. Warner*, 75 Conn. 375, “While it is true that there may be an acceptance and actual receipt of the goods by the vendee pursuant to a sale, unaccompanied by a manual delivery or actual change of custody—as in cases where the vendee is already in possession, or the vendor retains the custody as bailee of the vendee, thus assuming a new relation to the goods—yet the law requires that the proof in such cases should be clear and unequivocal, and establish an actual change of the relation of the

Since, however, receipt of the goods does refer to the physical thing a physical change of possession should be necessary. And this is in fact the rule, although change of possession does not necessarily mean change of position. In one case the court said, "I am aware that there are cases in which it has been adjudged that where the articles sold are ponderous, a symbolical or constructive delivery will be equivalent in its legal effect to an actual delivery. The delivery of a key of a warehouse in which goods sold are deposited, furnishes an example of this kind."¹⁰² In this case, however, there had never been an actual transfer of anything. When the buyer examined the lumber sold, and agreed to take it, the plaintiff, as seller, said "the lumber is yours." It was on the strength of this that the plaintiff contended the Statute had been satisfied. The court held, that "here there was no delivery, either actual or symbolical." "Mere words of contract unaccompanied by any act can not amount to a delivery. To hold otherwise would be repealing the Statute."¹⁰³

Mutuality of Intent.—The term "receipt" connotes a giving by some one else. It is suggestive of a reciprocal, two-party affair. Therefore there is no "receipt," within the meaning of the Statute, of goods which one person has *taken*, or otherwise acquired, from another person without the latter's consent. There is nothing

parties to the property." But, actual receipt means such possession by the buyer as "to unequivocally place the property within the power and under the exclusive dominion of the buyer as an absolute owner," *Urbanski v. Kutinski* 86 Conn. 22.

102—*Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316.

103—*Accord*, J. H. Silkman

Lumber Co. v. Hunholtz, 132 Wis. 613, "mere words *inter partes* will not, under the statute of frauds, effect a change of possession." *Ladnier v. Ladnier*, 90 Miss. 475, 43 So. 946.

If the buyer is already in possession, mere words may be sufficient for only "acceptance" is necessary in such case, *Godkin v. Weber*, 154 Mich. 207.

in such one-sided basis of possession to open the way to proof of a *contract*.¹⁰⁴

Receipt and Acceptance Both Essential.—Mere actual receipt of the goods, while essential, is not alone sufficient to take the contract out of the Statute. There must be "acceptance" as well as receipt. Thus, mere delivery of a car load of goods onto a buyer's side-track, without any act of acceptance by the buyer, does not satisfy the Statute.¹⁰⁵ Similarly, delivery by the seller of wood contracted for, upon property owned by the buyer, even though done according to the buyer's direction, is not enough.¹⁰⁶ It is not enough even if the buyer subsequently moves the wood from one place to another in order to make a passage way through it.¹⁰⁷

Acceptance.—As the foregoing discussion indicates clearly that something more than physical receipt of the goods is necessary to constitute "receipt and acceptance," the question is presented, what constitutes acceptance?

A concise answer is given in one case,¹⁰⁸ as follows: "If the vendee does any act to the goods, of wrong if he is not the owner of the goods, and of right if he is owner of the goods, the doing of that act is evidence that he has accepted them."

The literal statement of this test is in conflict with the proposition that a contract of conditional sale can be taken out of the Statute through the buyer's receipt and

104—*Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Matthieson Co. v. McMahon*, 38 N. J. L. 536.

105—*Calvert v. Schultz*, 143 Mich. 441; *Elchberg Co. v. Paper Co.*, 119 Mo. Ap. 262, delivery to warehouse of a terminal company and notification to buyer; *Kemen-sky v. Chapin*, 193 Mass. 500.

106—*Dauphiny & Co. v. Red Poll Co.*, 123 Cal. 548.

107—*Wade v. N. Y. & O. M. Ry. Co.*, 52 N. Y. 627.

108—*Leonard v. Medford*, 85 Md. 666, 37 L. R. A. 449, quoting from *Parker v. Wallis*, 5 El. & Bl. 21.

acceptance of the goods concerned, even though the title does not pass to him at all.¹⁰⁹ But the general idea seems to accord with the cases, and if for "owner" is understood one who has some legal right in the goods themselves the test is correct and readily applicable.

Certainly there is authority to the effect that mere physical receipt by the buyer himself, and even use by him, as for the purpose of testing the goods, does not *necessarily* constitute an acceptance.¹¹⁰

On the other hand, if the buyer, having actually received the goods, does assert rights in them there may be an "acceptance," even though such assertion of right is on a theory other than that of the contract alleged. For instance, in *Durkee v. Powell*,¹¹¹ the defendant had bought a house. The seller claimed, and the court agreed, that the shades and screens had been sold as personalty by an independent contract, although to the same buyer. The defendant took possession of the screens, etc., along with the house and, denying the second contract, asserted a right of possession of them as part of the realty. The court held this to be a sufficient receipt and acceptance to take the contract out of the Statute. It should be noted that the *receipt* in this case was by virtue of the contract, although the *acceptance* was under a different claim.

If such a decision seems still to leave the question of contract to the possibly perjured testimony of the par-

109—*Pinkham v. Mattox*, 53 N. H. 600.

110—*Lloyd v. Wright*, 25 Ga. 215; *Wainscott v. Kellogg*, 84 Mo. Ap. 621; *Hatch v. Gluck*, 93 N. Y. S. 508; *Mechanical Boiler Cleaning Co. v. Kellner*, 62 N. J. L. 544, 559, "Another proposition that is vouched for upon principle and by the weight of authority is that possession itself is not evidence of an acceptance, and that a compliance with the statute would require an acceptance by the vendee

as owner." Other authority for this proposition is cited in the case. As a matter of fact, however, the discussion in this case was unnecessary, because the buyer had never "accepted" the plaintiff's *offer to sell* and there was, in consequence, no contract of sale at all. *Darnell v. Young*, 105 Md. 280, buyer took control of goods only for purpose of sending them back to seller.

111—77 N. Y. S. 368.

ties, it must be borne in mind that, unlike the written memorandum, the receipt and acceptance of goods is not supposed to show what the contract was. Its purpose is merely to furnish a basis for supposing that there was really some sort of a contract between the parties. The way is then opened for evidence, oral or otherwise, as to just what the contract was.¹¹²

There is no rule, and can be none, as to what sort of act will or will not indicate acceptance. As the test above quoted says, any act that indicates an assertion of legal interest in the goods may serve for acceptance. As the possible acts so indicating are multitudinous, they can not and need not be legally hall-marked. The whole matter is a question of fact in each particular case—the fact of whether the act done indicates an assertion of right in the goods. Many courts answer this as a judicial conclusion.¹¹³ Many courts, however, leave the question to be decided by the jury.¹¹⁴

—**Acceptance by Agent.**—The receipt and acceptance need not be by the buyer personally, but may be done through an agent.¹¹⁵

112—*Slater Brick Co. v. Shakelton*, 30 Mont. 390.

In *Edgar v. Breck & Sons*, 172 Mass. 581, the acceptance was made under such circumstances as to refute the idea of a warranty by the seller. The court held, however, that the acceptance did not constitute a new contract, but only opened the way for proof of the real contract which in fact contained a warranty.

113—*Koster v. Koedding*, 68 N. Y. S. 794, holding that keeping a horse for 24 hours and using him was an acceptance; *MacEvoy v. Aronson*, 92 N. Y. S. 724, inferred from unreasonable delay in returning physical possession; *Adams County etc. Co. v. Walla*

Walla etc. Co., 64 Wash. 285, *id.*; *Godkin v. Weber*, 154 Mich. 207; *Richards v. Burrows*, 62 Mich. 117, causing wood to be repiled; *Schmidt v. Thomas*, 75 Wis. 529, oral statements.

114—*Garfield v. Paris*, 96 U. S. 557; *Pinkham v. Mattox*, 53 N. H. 600; *Jarrell v. Young*, 105 Md. 280.

115—*Daniel v. Hannah*, 106 Ga. 91; *Wilcox etc. Co. v. Green*, 72 N. Y. 17; *Jones v. Mechanics Bk.*, 29 Md. 287, 96 Am. Dec. 533; *Townsend v. Hargraves*, 118 Mass. 325, through attornment of third person in possession.

An administrator is not an agent, for such a purpose, *Smith v. Brennan*, 62 Mich. 349.

—**Acceptance by Carrier.**—Title to goods which were unspecified at the time the contract was entered into is generally held to pass to the buyer on the seller's delivery to a carrier of goods conforming to the contract. As has already been pointed out, this is based on the theory—or the legal fiction—that the carrier is the buyer's agent to assent to the seller's specification. In a sense the carrier is the buyer's agent to accept the title to the goods. It is occasionally said, therefore, that "the carrier is the buyer's agent to accept." So far as this means "to accept *title*," it is, in some measure, correct. But it is incorrect to say that the carrier is agent to accept the goods, within the meaning of the Statute. Delivery of goods to a carrier and its acceptance of them for carriage to the buyer may constitute actual receipt of them by the buyer. But it does not constitute *acceptance* of them by either the buyer or his agent. This is so even though the buyer has himself designated the carrier to be used.¹¹⁶

There is some conflict on this point, more apparent than real, however, when the facts are examined. In *Cross v. O'Donnell*,¹¹⁷ the buyer of certain hoops had carefully examined them and agreed to take specific ones. He directed that these be delivered, for him, to a certain boat, which was done. The court held the Statute to be satisfied, saying, "Here the defendants accepted the hoops. * * * There is nothing in the Statute which requires that the accepting and receiving at the same time. Either may precede the other. * * * It has finally been settled, both in this country and in England, that a delivery to a general carrier, not designated by the purchaser, is not a sufficient compliance with the

116—*Johnson v. Cuttle*, 105 Mass. 447, 7 Am. Rep. 545; *McCormick Mach. Co. v. Cusack*, 116 Mich. 647; *Gard v. Ramos*, 23 Cal. Ap. 303, "delivery" and "receipt" are not synonymous; *Kemensky v. Chapin*, 193 Mass. 500; *Booth v.*

A. Levy & Co., 21 Cal. Ap. 427; *Darnell v. Young*, 105 Md. 280; *Shelton v. Thompson-Bennett Co.*, 96 Mo. Ap. 327.

117—44 N. Y. 661, 4 Am. Rep. 721.

Statute, *Rodgers v. Phillips*,¹¹⁸ and for the best of reasons. In such a case the purchaser has done nothing beyond making the void contract. He has neither accepted nor received the goods himself, nor authorized or designated any agent to do it for him. But, in this case, the purchasers designated the agents of the 'Curlew' to receive and transport the hoops to them. They were the agents of defendants for the purpose of receiving the hoops from the plaintiffs. It is not necessary to determine in this case that a mere carrier, designated by the buyer, can both accept and receive for him, so as to make a compliance with the Statute; but I can find no reason, founded upon principle or authority, to doubt that, after the buyer has accepted the article purchased, a carrier, designated by him to take and transport it, can bind him as his agent in receiving it.'¹¹⁹

—**Time of Acceptance.**—The receipt and acceptance need not be coincident with the making of the contract, but may take place any time thereafter.¹²⁰

Furthermore, as the cases cited on the various points above clearly show, the acceptance need not be coincident with the receipt, but may follow it. It has been said even that acceptance may precede receipt.¹²¹

Receipt and Acceptance of Part of the Goods.—Receipt and acceptance of a part of the goods contracted for is sufficient to take the entire contract out of the statute and permit oral evidence of the sale of the whole amount. A somewhat extreme illustration is *Garfield v. Paris*.¹²²

118—40 N. Y. 519.

119—Real conflict is found in *Spencer v. Hale*, 30 Vt. 314, 7 Am. Dec. 309, where the buyer had not accepted, but had merely designated the carrier.

120—*Pinkham v. Mattox*, 53 N. H. 600; *McKnight v. Dunlap*, 5 N. Y. 537; *Rickey v. Tenbroek*,

63 Mo. 563; *Slater Brick Co. v. Shakelton*, 30 Mont. 390; *Gabriel v. Kildare Elevator Co.*, 18 Okla. 318; *Raymond v. Colton*, N. Y. 104 Fed. 219.

121—*Cross v. O'Donnell*, 44 N. H. 661, 4 Am. Rep. 721.

122—96 U. S. 557.

The defendant had contracted to buy liquor from the plaintiff, the goods being described by the contract, but not then identified. As part of the contract the plaintiff agreed to furnish labels of a special type, other than those ordinarily on the bottles. The plaintiff did send a bunch of such labels to the defendant and the jury found that they were accepted by him. On suit for the purchase price, the defendant set up the Statute. The court held, however, that the receipt and acceptance of the labels opened the way for oral proof of the entire contract.¹²³

As to the propriety of this rule, another court has said,¹²⁴ "It has been insisted that this construction may leave a purchaser, who buys and receives a single article, liable to be charged as the purchaser of more, if the vendor can bring perjured witnesses to say that it was delivered as part of the greater number purchased. Parties are exposed to the commission of perjury, in relation to all facts depending on human testimony. If the sanctions of an oath, and a severe cross-examination prove an insufficient security, the party liable to suffer must seek protection in the congruity and consistency of truth, and the extreme difficulty of making falsehood accord with the context of circumstances. The Statute of Frauds has interposed some salutary safeguards. If they are not sufficiently enlarged, the legislature alone has power to extend its provisions."

—Must be Goods Contracted For.—The goods actually received and accepted must be part of the goods covered by the contract alleged. The mere fact that the defendant has accepted certain goods will not open

123—*Accord, French v. Boston Nat'l Bk.*, 179 Mass. 405; *MacEvoy v. Aronson*, 92 N. Y. S. 724; *New England etc. Co. v. Standard etc. Co.*, 165 Mass. 328, 52 Am. St. 516; *Weeks v. Crie*, 94 Me. 458, 80 Am. St. 410; *Richardson v. Smith*, 101

Md. 15, 109 Am. St. 552; *Leonard v. Medford*, 85 Md. 666, 37 L. R. A. 449; *Ford v. Howgate*, 106 Me. 517; *Conelly Construction Co. v. Royce*, 35 Okla. 425.

124—*Davis v. Moore*, 13 Me. 424.

the way to proof of some contract which did not cover those goods. Acceptance of goods does not permit proof of any and every contract of sale between the parties, but only of the particular contract under which the goods were delivered and received. In *Richardson v. Smith*,¹²⁵ for instance, the contract was for the sale of a number of cases of canned tomatoes. At the time the contract was made the defendant had received, and apparently accepted, a couple of cans as samples. These cans so received, however, were not deducted from the number which the plaintiff agreed to furnish for the price stated. It was held that *no part of the goods contracted for* had been received by the buyer. The court said,¹²⁶ "The receipt and acceptance of the buyer of samples of the goods are held to be a compliance with the Statute when the samples are considered and treated *by both parties* as constituting a *part of the goods sold* and as *diminishing the quantity or weight of such goods* to the extent of their own bulk, *otherwise the taking of samples has no effect upon the validity of the contract.*"

—**Must Have Been Received Under the Contract.**—

It obviously follows from this principle that the goods "accepted" must have been received under and by virtue of the contract. Hence, even though the buyer takes possession of the goods under a claim of ownership or otherwise, it is not an "acceptance" of them under the contract of sale if the seizure were by way of trespass, or foreclosure of a mortgage, or attachment, or for some other reason than the contract.¹²⁷ This is not inconsistent with the decision in *Durkee v. Powell*, *supra*, because in that case the goods were received under the contract

¹²⁵—101 Md. 15, 109 Am. St. 552.

¹²⁶—Quoting from the American and English Encyclopedia of Law and citing considerable authority.

¹²⁷—*Hudson v. Emmons*, 107 Mich. 549; *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Baker v. Cuyler*, 12 Barb. (N. Y.) 667. See also, *ante*, p. 265.

which was later denied. They were not taken by trespass originally.

—**Separate Contracts.**—Another phase of the same rule is the fact that receipt and acceptance of goods delivered under one contract will not admit oral proof of another contract, even though the latter has been entered into coincidentally with the first or is otherwise intimately related to it. In *Tompkins v. Sheehan*¹²⁸ the defendant had contracted to buy 1900 shares of stock then owned, in severalty, by five different persons. The arrangement was made through one owner as an agent representing all of the others and the defendant contracted to take all 1900 shares. The certificates of one owner, the plaintiff, were not immediately at hand and those of the other owners, representing 1700 shares, were delivered and accepted by the defendant. Thereafter the plaintiff's shares were delivered, but were refused. On suit it was contended that acceptance of the 1700 shares opened the way for oral proof of the contract. The court held that it was not a question of proving the contract; that there were in fact five separate contracts and that acceptance of goods covered by four of them would not open the way for proof of the fifth.¹²⁹

The most difficult problem arising out of this rule is to determine when there is one entire contract, under which a part of the goods have been received and accepted, and when there are merely two or more coincident and related but wholly independent contracts. There are no rules for determining this issue. Decisions involving the same essential facts have not been sufficiently numerous so that any judicial custom can be deduced. As yet, therefore, each case depends upon the conclusion of the particular judge, without the guidance of rule, although possibly influenced by other decisions on more

128—153 N. Y. 617.

Weeks v. Crie, 94 Me. 458, 80 Am.

129—*Accord*, *McCormick Mach.*

St. 410.

Co. v. Cusack, 116 Mich. 647;

or less similar facts. There is no need here for reference to particular cases which have, on their own facts, been held to show or not to show an entire contract.¹³⁰

Many courts recognizing that the question is entirely one of fact—though, properly speaking, it is one of conclusion, rather than of actual fact—have shifted the burden of the conclusion to the jury. In *Weeks v. Crie*,¹³¹ the trial court had instructed the jury as a matter of law, that if the two contracts were made at the same interview they constituted a single agreement in this respect. The upper court said, “Whether such negotiations for separate articles result in one entire contract for the whole, or whether the contract for each remains separate and distinct, may depend upon many circumstances. It raises a question of fact properly to be passed upon by a jury. * * * If the circumstances are such as to lead to a reasonable supposition that the parties intended that the whole series of transactions should constitute one

130—By way of illustration, in *Ford v. Howgate*, 106 Me. 517, the contract was held to be entire although covering shares of stock and an interest in an automobile.

One keenly analytical text-writer, Williston, *Contracts*, Sec. 863, however, lays down this proposition:—“The essential test to determine whether a number of promises constitute one contract or more than one is simple. It can be nothing else than the answer to an inquiry whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out.” But as the writer himself states and as is obvious from the decisions discussed, this test is exceedingly indefinite in its application.

A clear distinction should be kept in mind between this ques-

tion of whether there is one single contract or several separate ones and the question whether one single contract is itself entire or is divisible, so that breach of one part is or is not breach of the whole contract. For instance, in *Herbert v. Rhodes, etc. Co.*, 106 Ill. Ap. 579, a contract for the sale of twelve dozen pairs of pants was held to be divisible, so that the buyer could keep one dozen pairs and reject the other eleven dozen pairs. It seems impossible, however, that, had the question of the Statute been involved, the court would have held it to be twelve separate contracts. Cases involving only the entirety or divisibility of an admittedly single contract should not properly be treated as authority on the question whether there is one contract or more.

131—94 Me. 458, 80 Am. St. 410.

trade, they may be regarded as one entire contract; otherwise not. * * * Whether the negotiations constituted one contract or more was a question of fact, and should have been submitted to the jury."

This shifting of the responsibility to the jury would seem undesirable. Inasmuch as the jury have no definition of the distinction between one contract and several contracts to work on, there can be no pretense of consistency in their decisions. Although the conclusion sought is in a sense a question of fact, it is at best a conclusion only. In reaching it the judge at least has the benefit of prior conclusions which may be analogous, even though they be not so frequent as to constitute a rule.

4. SATISFACTION OF THE STATUTE BY PAYMENT, OR GIVING OF EARNEST MONEY

All that has just been said of receipt and acceptance as satisfying the Statute is true also—so far as it can be applied—of payment as a satisfaction of the Statute.

In addition to its reference to receipt and acceptance of goods the Statute also permits proof of an oral contract if the buyer has given "something in earnest to bind the bargain or in part payment." The phrases "in earnest" and "in part payment" are treated by the courts as being synonymous.¹³²

Time of Payment.—The payment need not be made at the time of the making of the contract, but may be at any time thereafter.¹³³

132—Groomer v. McMillan, 143 Mo. Ap. 612; Howe v. Hayward, 108 Mass. 54; Hudnut v. Weir, 100 Ind. 501.

133—Driggs v. Bush, 152 Mich. 53. See also the cases cited in the following notes.

Where, however, a statute like that of New York expressly pro-

vides that the buyer "shall at the time pay some part of the purchase money," the rule is otherwise. Effect is given to the requirement and it is held that while payment need not be concurrent with the original making of the agreement, at least, when it is made, "the parties must reaffirm

Medium of Payment.—The payment need not be in money. As has already been pointed out, the Statute applies to contracts of barter and exchange as well as to technical sales. "Payment" is accordingly construed to cover the goods, services, or any other thing which forms the *quid pro quo* for the title.¹³⁴

Since the cancellation of an existing debt is perfectly valid consideration for a promise, it follows that the payment may be in the form of canceling a debt. Thus, giving credit on notes of the seller is such a payment by the buyer as will take the matter out of the Statute.¹³⁵

—**Promise as Payment**—However, just as in the case of alleged receipt of part of the goods, mere words are not sufficient of themselves to constitute payment. There must *be payment*. "The payment may be made in money or property, or in the discharge of an existing debt, in whole or in part, due from the vendor to the purchaser. Or the extinguishment of, or payment upon a promissory note held by the latter against the former. A mere agreement to apply the purchase money to either of these objects would not be enough, because the contract would still rest in words, and nothing more. The agreement to pay the note or satisfy the debt must be consummated and carried into effect by an act which shall be obligatory

or restate the terms of the contract." And this reaffirmance must be express and for the purpose. *Koewing v. Wilder*, N. Y., 128 Fed. 558; *Colton v. Raymond*, N. Y., 114 Fed. 863; *Milos v. Covacevitch*, 40 Ore. 239.

134—"The term 'purchase money' as used in this statute, means simply the compensation or consideration which the seller is to receive for his property," *Johnson v. Tabor*, 101 Miss. 78, citing *Devin v. Himer*, 29 Ia. 297; *Driggs v. Bush*, 152 Mich. 53; *Bra-*

bin v. Hyde, 32 N. Y. 523; *Koewing v. Wilder*, N. Y., 128 Fed. 558; *Burton v. Gage*, 85 Minn. 355, assignment of another contract as payment.

Cf. *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, in which it was held that the buyer's resignation from a company was not part payment even though it might have been a valid "consideration" for the seller's promise.

135—*Johnson v. Tabor*, 101 Miss. 78; *Diekman v. Young*, 87 Mo. Ap. 530.

upon the purchaser and enable the vendor to enforce the contract of sale. The note should be delivered up and cancelled; or, if the purchase money falls short of complete payment, it should be extinguished by an indorsement made upon it in writing which shall operate effectually as an extinguishment *pro tanto*. And if the purchase money is to be applied to pay an open account, in whole or in part, the creditor and purchaser should part with some written evidence of such application which shall bind him and put it in the power of his debtor and vendor to enforce the contract."¹³⁶

Mutuality Required.—The alleged payment, to be really such, must be not only delivered by the buyer, but also must be accepted by the seller. Thus, mere physical receipt of a draft by the seller, even though the buyer intended it as payment, is not payment if the seller has never accepted it as such.¹³⁷ And, in general, the receipt and acceptance of a check, draft or other paper is not payment, "*unless it is received by the seller and agreed that it is an absolute payment*"; and this must be clearly established."¹³⁸ *A fortiori*, mere tender of payment which is refused by the seller is not enough to take the case out of the Statute.¹³⁹

Conversely, a physical transfer by the buyer to the seller of things which he does not intend the seller to keep in payment, will not amount to a payment.¹⁴⁰

136—Brabin v. Hyde, 32 N. Y. 519; Accord, Gorman v. Brossard, 120 Mich. 611; Milos v. Covacewitch, 40 Ore. 239.

137—Johnson v. Morrison, 163 Mich. 322; Young v. Ingalsbe, 208 N. Y. 503; Driggs v. Bush, 152 Mich. 53.

138—Groomer v. McMillan, 143 Mo. Ap. 612, holding also that a draft, not so received in payment, is not even something given in earnest. Accord, Hessberg v. Welsh, 147 N. Y. S. 44; Bates v.

Dwinell, 101 Neb. 712, 164 N. W. 722; Knohn v. Bantz, 68 Ind. 277, note; Combs v. Bateman, 10 Barb. (N. Y.) 573, note.

A check which is received in payment is "payment" within the meaning of the Statute, Logan v. Carroll, 72 Mo. Ap. 613; McLure v. Sherman, 70 Fed. 190.

139—Hershey Lumber Co. v. St. Paul etc. Co., 66 Minn. 449.

140—Weir v. Hudnut, 115 Ind. 525.

Through Agents.—Payment need not be made directly to the seller, but may be received and accepted by an agent.¹⁴¹

5. EFFECT OF FAILURE TO SATISFY THE STATUTE

If there be no memorandum, no part payment, nor receipt and acceptance of the goods, the original Statute provides that the contract shall not "be allowed to be good". In the various states the phraseology differs. Some declare such contracts "invalid," others make them "void." Still others provide that they "shall not be binding." This variation of form of expression, however, seems to have little if any effect upon the judicial interpretation. To say that a contract "shall not be allowed to be good" seems obviously only a lengthier way of saying that it is "void," or "invalid." Except for sporadic instances, the courts do treat them as synonymous. The effect of the Statute depends upon the meaning given by the courts to these expressions.

Does Not Destroy the Contract.—As was indicated heretofore, there is considerable question whether the primary purpose of the Statute is to prevent perjury or to protect property.¹⁴² Whatever the answer to that may be, it may be said in general that the Statute is treated as being for the benefit of the parties to the contract, rather than for the benefit of the public. It is not applied to the prevention of perjury nearly so widely as its literal statement, that the contract shall not be allowed to be good, would admit.

As between the parties, if the parties to the suit do not themselves choose to take advantage of the Statute,

141—Case v. Cramer, 34 Mont. 142; Jones v. Wattles, 66 Neb. 533. But such alleged agent must at least have had authority to make a contract. City Drug Co. v. Am. Soda Co., 13 Ga. Ap. 435.

142—See *ante*, p. 238. The object of the law is to prevent false swearing and perjury, Michels v. West, 109 Ill. Ap. 418; Townsend v. Hargraves, 118 Mass. 325.

the court will not of its own initiative object to the proof of the contract, nor consider whether the testimony is apt to be perjured.¹⁴³ It is too late for even a party to object that the contract is not in writing, after the trial has been had without such objection.¹⁴⁴

If the contract is permitted to be proved because there has been such acceptance, or part payment, or memorandum, as will take it out of the Statute, its terms and its effects are considered as of the date it was entered into. If proved, it takes effect as a valid oral contract, not as though it were some new agreement entered into at the time the acceptance or payment occurred, or the memorandum was written. For instance, in *Vincent v. Germond*,¹⁴⁵ the plaintiff had sold four cattle to the defendant with the express stipulation that the risk of loss should be on the defendant. It was an oral contract, with nothing to take it out of the Statute. One of the cattle died. Subsequently the defendant received and accepted the remaining three. The seller was given judgment against him for the price of all four cattle. Although the fourth animal was not in existence when the receipt and acceptance took place, the buyer's liability was determined by the terms of the oral contract and as of the date on which it was entered into.¹⁴⁶

In fact, there is nothing to indicate but that the contract is good and valid in all respects, if it can be proved.

—As Regards Third Persons.—As regards third persons, not parties to the contract, or in privity with the

143—*Booker v. Wolf*, 195 Ill. 365; *Mather v. Scoles*, 35 Ind. 1, referring to the 4th section only.

144—*Simis v. Wissel*, 41 N. Y. S. 1024, referring to sec. 4; *Michels v. West*, 109 Ill. Ap. 418, sec. 4.

145—11 Johns. (N. Y.) 283.

146—*Accord, Townsend v. Hargraves*, 118 Mass. 325, citing *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140; *Phillips v. Oc-*

mulgee Mills, 55 Ga. 633; *Riley v. Bancroft's Est.*, 51 Neb. 864, holding that title passed when the contract was made, even though the acceptance which permitted proof of the contract did not take place till some time after; *Amsinck v. Am. Ins. Co.*, 129 Mass. 195, title passes so as to give buyer an insurable interest at date of oral contract.

parties, the contract is equally good and valid if proved. Moreover, as regards such third persons, the contract does not need to conform to the Statute in order to be provable. As to them the oral contract is not only allowed to be good; it is even allowed to be proved, despite objection and appeal to the Statute. In *Jackson v. Stanfield*,¹⁴⁷ for instance, the plaintiff sued to recover damages because defendant had induced the Studebaker Bros. to break a contract with plaintiff. This contract was oral, for the sale of chattels, and came within the Statute. The court said, "It is urged that the contract between the Studebaker Bros. Manufacturing Company and appellant Newton Jackson is void under the Statute of Frauds, because the value of the lumber was over \$50, and the finding does not show that the offer was accepted in writing. If this be true, it is no concern of the appellees (the defendants). Parties to contracts and their privies can alone take advantage of the fact that a contract is invalid under the Statute of Frauds. Many forms of expression by this and other courts illustrate the doctrine that a third person can not make the Statute of Frauds available to overthrow a transaction between other persons; that the defense of this Statute is purely a personal one and can not be made by strangers."¹⁴⁸ It concerns the remedy alone, and the modern law is well settled that, in the absence of a statutory provision to the contrary, the effect of the Statute is not to render the agreement void, but simply to prevent its direct enforcement by the parties, and to refuse damages for its breach."¹⁴⁹

¹⁴⁷—137 Ind. 592, 23 L. R. A. 588.

¹⁴⁸—Citing other Indiana cases and 8 Am. & Eng. Encyc. of Law, 659.

¹⁴⁹—The Indiana statute provides that such contracts "shall not be valid." Accord, *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623; *Rice v. Manley*, 66 N. Y.

82, 233 Am. Rep. 30; *Int. & G. N. Ry. v. Searight*, 8 Tex. Civ. Ap. 593; *Cowan v. Adams*, 10 Me. 374, 25 Am. Dec. 242.

An insurance company can not defeat the claim of insured on the theory that a contract between the insured and some one else was rendered void by the Statute. *Northwestern Mutual Life Co. v.*

—As to Persons in Privity with the Parties.—A third person, however, who is in privity of relation with a party to a contract can take advantage of the Statute to protect himself. Thus a buyer in good faith from one in possession of the goods can use the Statute in defense against a plaintiff who claims the property under a prior oral contract.¹⁵⁰

—Creditors.—Creditors of a seller are not considered as privies to the contract and therefore can not set

Heiman, 93 Ind. 24, promise to answer for debt of another; Mutual Mills Co. v. Gordon, 20 Ill. Ap. 559; Amsinck v. Am. Ins. Co., 129 Mass. 185, *dictum*; Cowell v. Phoenix Ins. Co., 126 N. C. 684, sale of land.

In an action for damages because the defendant company had failed to deliver the message which would have created a profitable contract between plaintiff and a third person, it was held that the company had no defense in the fact that, because of the Statute, plaintiff could not have enforced the contract had the message been delivered. Purdom Naval Stores Co. v. Western Union Tel. Co., 153 Fed. 327; Kratz v. Stocke, 42 Mo. 351.

A written contract for sale of land on condition that it has not already been sold can not be enforced if there had been in fact a previous sale, even though that sale itself was oral only and not enforceable because of the Statute. Jacob v. Smith, 28 Ky. 380; Bohannon v. Pace, 36 Ky. 194. The rights of creditors to set up the Statute are noted hereafter.

In possible conflict with this principle, that a third person can

not take advantage of the statute, are the cases cited in the following notes.

150—First National Bk. v. Blair State Bk., 80 Neb. 400, 127 Am. St. 752. The reason given in this case is not that the second buyer is in privity with his seller in relation to the first contract, but the seller, in making the second sale, "repudiates and avoids" the first contract.

In Mahan v. U. S., 16 Wall. 143, the government, as confiscator of cotton alleged to be the property of A, was allowed to set up the Statute in defense to a claim by B that the cotton had previously been sold to her by oral contract. The theory appears to be, however, that the Statute made the sale void.

Sonneman v. Mertz, 221 Ill. 362.

In Petty v. Petty, 4 B. Monroe (Ky.) 215, 39 Am. Dec. 501, it was held, without reason given, that heirs of land could set up the statute against an oral contract made by their father on consideration of marriage. Accord, Vaughn v. Vaughn, 100 Tenn. 282, 45 S. W. 677; Sebben v. Trezevant, 3 Desaus. (S. C.) 213.

up the Statute to derogate the effect of the contract.¹⁵¹

As a Defense.—In another way, also, oral contracts within the Statute have in fact been allowed to be good even as between the parties. This is the case in which suit on a provable contract is defeated by showing that such written, or otherwise provable contract, has been rescinded through the substitution of a later oral contract. Even though the later contract is within the Statute and suit could not be brought upon it, some courts have nevertheless recognized its effect as putting an end to the original contract for which it was substituted.¹⁵²

151—*Cresswell v. McCaig*, 11 Neb. 222; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Gordon v. Tweedy*, 71 Ala. 202 land; *Brown v. Rawlings*, 72 Ind. 505 land; *Minus v. Morse*, 15 O. 568, 45 Am. Dec. 90 land.

An assignee for benefit of creditors can not set up the statute if the seller, his assignor, himself does not, *Walker's Assignee v. Walker*, 21 Ky. L. R. 1521.

In *Waite v. McKelvey*, 71 Minn. 167, however, it was held that a sheriff who had levied on chattels acquired all the title that the judgment debtor—the seller—had, and therefore could set up the statute against an alleged buyer under an oral contract. The theory was that the statute made the contract void.

152—*Reed v. McGrew*, 5 O. 376, sale of land; *Dearborn v. Cross*, 7 Cow. (N. Y.) 48, sale of land.

In general, a contract within the statute may be proved as a defense to an action on the common counts, *Laffey v. Kaufman*, 134 Cal. 391; *Weber v. Weber*, — Ky. —, 76 S. W. 507; *Schechinger v. Gault*, 35 Okla. 416, though Statute

made it "invalid"; *McKinnie v. Harvie*, 28 Minn. 18; *Sims v. Hutchins*, 8 S. & M. (Miss.) 328; *Philbrook v. Belknap*, 6 Vt. 383.

In *Morris v. Baron & Co.*, H. of L. 87 L. J. R. (K. B.) 145, an oral contract for sale of goods was held sufficient to defeat a prior enforceable contract for sale of goods for which the latter had been substituted. A positive action on the latter contract was refused. Some stress is given to the fact that the particular statute here involved provided only that oral contracts should not "be enforced by action."

The question of whether a contract of sale can be rescinded or altered by a later agreement not in writing is not peculiar to contracts of sale, nor in any way related to the statute of frauds. It is merely the general question as to whether any contract which is itself required to be in writing can be altered by subsequent oral contract. The Statute of Frauds itself does not cover the question. There is considerable conflict in the decisions on the question.

Rescission by oral agreement

In various other respects, also, courts have given effect to a contract on which no action could have been maintained directly.¹⁵³

On the other hand, if the Statute is intended to prevent perjury, rather than merely to protect property rights,¹⁵⁴ the damage is equally great whether a contract is sued on or is set up in defense. For this reason other courts have refused to admit evidence of an oral contract within the Statute even by way of defense.¹⁵⁵

was recognized in *Proctor v. Thompson*, 13 Abbott, N. C. (N. Y.) 340.

Oral extension of time was allowed in *Neppach v. Oregon etc. R. R.*, 46 Ore. 374, 7 Ann. Cas. 1035, in which much conflicting authority is cited.

153—Such is its use to show value in an action on quasi-contract. *Murphy v. DeHaan*, 116 Ia. 61, although statute provided that "no evidence should be given" of such contracts.

Contra, because made "void," *Sutton v. Rowley*, 44 Mich. 112.

To show the amount of rent due, *Evans v. Winona Lumber Co.*, 30 Minn. 515; *Steele v. Anheuser-Busch Ass'n*, 57 Minn. 18.

To show amount of damage, *Burrus v. Hines*, 94 Va. 413.

For various other purposes, *Michels v. West*, 109 Ill. Ap. 418; *Coughlin v. Knowles*, 7 Metc. (Mass.) 57.

154—"The statute of frauds and perjuries (was) a great and necessary security to private property", Blackstone, Commentaries, Bk. 4, *p. 440.

155—*Scotten v. Brown*, 4 Har. (Del.) 324; *Bernier v. Cabot Mfg. Co.*, 71 Me. 506; *King v. Welcome*, 5 Gray (Mass.) 41, statute provided only that "no action shall be brought"; *Zeuske v. Zeuske*, 55 Ore. 65, Ann. Cas. 1912 A 557; *Nelson v. Shelby Mfg. Co.*, 96 Ala. 515, statute made contract "void"; *Lemon v. Randall*, 124 Mich. 637, *id.*; *Salb v. Campbell*, 65 Wis. 405; *Kelley v. Thompson*, 181 Mass. 122, not allowed by way of establishing a set-off.

UNIFORM SALES ACT

Uniform legislation called the Uniform Sales Act has been enacted in a number of states in an attempt to eliminate diversity of judicial rulings in regard to sales and contracts to sell. This Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws in 1906. Since that time it has been adopted, with some minor changes, in the following states and territories: Alaska, 1913; Arizona, 1907; Connecticut, 1907; Illinois, 1915; Iowa, 1919; Maryland, 1910; Massachusetts, 1908; Michigan, 1913; Minnesota, 1917; Nevada, 1915; New Jersey, 1907; New York, 1911; North Dakota, 1917; Ohio, 1908; Oregon, 1919; Pennsylvania, 1915; Rhode Island, 1908; Tennessee, 1919; Utah, 1917; Wisconsin, 1911; Wyoming, 1917.

The following is the text of the Uniform Act as presented by the Commissioners. Under each section are digested such decisions as seem to interpret, clarify, or apply the rule. These citations, however, do not purport to be a complete reference to the cases decided under the Act. For fuller citation of such decisions the reader is referred to "The Uniform State Laws, Annotated," by C. T. Terry and to "Some Reasons Why the Code States Should Adopt the Uniform Sales Act," by Lauriz Vold, in 6 Calif. L. R. 37. Not all of these decisions refer expressly to the Act, but they are assumed to have been made with reference to it, because they were rendered subsequent to its adoption in the particular state—admittedly a somewhat dubious assumption.

It seems unnecessary for the author himself to undertake comments on the Act. The reader can interpret it

equally well for himself through a comparison of its provisions with the relevant rules of the Common Law as set out in the preceding text. To facilitate this, the related sections of the Act are noted throughout the text.

The purpose of the Act is to procure uniformity of rule and it should be so interpreted. (See sections 73 and 74.)

AN ACT TO MAKE UNIFORM THE LAW OF SALES OF GOODS

PART I

FORMATION OF THE CONTRACT

Section 1.—Contracts to Sell and Sales.—(1.) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2.) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3.) A contract to sell or a sale may be absolute or conditional.

(4.) There may be a contract to sell or a sale between one part owner and another.

Furnishing of food in a restaurant is not a "sale" either at common law or under the Act, *Merrill v. Hodson*, 88 Conn. 314.

But compare, *Friend v. Childs Co.*, Mass., 120 N. E. 407; *Barrington v. Hotel Astor*, 171 N. Y. S. 840.

"Passing of title (is) the cardinal difference between sale and the relation of principal and factor." Act not mentioned. *McGraw v. Hanway*, 120 Md. 197.

A "sale" requires "transfer of the general or absolute property as distinguished from a special property." Act not mentioned. In *re Grand Union Co.*, (N. Y.) 219 Fed. 353.

Section 2.—Capacity—Liabilities for Necessaries.—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessities are sold and delivered to an infant, or to a person who by reason of mental incapacity or

drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

FORMALITIES OF THE CONTRACT

Section 3.—Form of Contract or Sale.—Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

(See related provisions of the next section.)

Section 4.—Statute of Frauds.—(1.) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

Adoption of the Act repealed the existing statute of frauds making "void" sales of \$50 or more in value. *Eigen v. Rosolin*, 85 N. J. L. 515.

A contract whereby the parties agree to purchase property jointly from a third person and each to provide a part of the funds therefor is not a "contract of sale", even though the goods are to be divided in specie. There is a distinction between such agreements that the title shall come to the parties jointly and contracts whereby one agrees to take title himself and thereafter transfer an interest to the other. *Stock v. Roth Bros. Co.*, 162 Wis. 281.

When, under a single contract of sale in which the seller agrees to buy back the goods, there is receipt and acceptance of the goods by the buyer, the statute is so far satisfied that the buyer can enforce the seller's agreement to buy back. *Armstrong v. Orler*, 220 Mass. 112.

Payment of part of price takes an oral contract out of the statute. *Meyer v. Shapton*, 178 Mich. 417.

The memorandum may consist of various papers connected by reference and "it matters not how informal or bunglingly constructed the writing may be." *Spiegel v. Lowenstein*, 147 N. Y. S. 655.

The memorandum must show the agreement as entered into, with all its terms and conditions. *Bauman v. Mendell Lunepp Co.*, 153 N. Y. S. 896.

Action for purchase price of tar. Plaintiffs admitted that they had agreed to furnish tar which should be satisfactory to highway commissioner. The written memorandum did not contain this provision. Held, memorandum insufficient to satisfy the statute. *Barrett Mfg. Co. v. Ambrosio, Conn.*, 96 Atl. 930.

Printed signature, delivered by the defendant, is sufficient. *Goldowitz v. Kupfer & Co.*, 141 N. Y. S. 531.

Signature by agent in his own name is sufficient to bind his principal. *Hager v. Henneberger*, 145 N. Y. S. 152.

A sale of corporate stock is within the statute. *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323.

Growing crops are within the statute. *Willard v. Higdon*, 123 Md. 447.

Sale of a house, then a part of the realty, to be removed by the buyer. Held, *if* title was to pass before severance it was a sale of realty, otherwise of personalty. Fact that buyer is to do the severing is important only in determining the intent as to when title was to pass. Held error to exclude evidence as to such real intent. *Wetkopski v. N. H. Gas Co.*, 88 Conn. 1.

(2.) The provisions of this section apply to every such contract or sale, notwithstanding the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

As to sale of wheat, etc., to be threshed, shucked, or gathered, the Act changes the prior rule and such contracts are now within the statute. *Willard v. Higdon*, 123 Md. 447.

A contract to manufacture a suit of clothes from cloth of a special pattern is covered by the exception and need not be in writing. *Schneider v. Lezinsky*, 162 N. Y. S. 769.

Sale of clothing to be made out of existing cloth held not within the statute; the Act was not mentioned. *Davis v. Blanchard*, 138 N. Y. S. 202.

(3.) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Acceptance may precede delivery. *Laundry Co. v. Whitmore*, 92 O. S. 44, *dictum*.

The Act "seems to separate acceptance from receipt and provide that the former requirement may be satisfied by words or conduct, while the latter presupposes a delivery by the seller and requires some intentional act of receipt on the part of the purchaser." But such actual receipt, whether before or after the acceptance, is essential. *Friedman v. Plous*, 158 Wis. 435.

Whether or not acceptance and receipt have taken place is a question of fact for the jury. *Laundry Co. v. Whitmore*, 92 O. S. 44; *Friedman v. Plous*, 158 Wis. 435, although the finding of the jury may be reversed for lack of evidence.

SUBJECT MATTER OF CONTRACT

Section 5.—Existing and Future Goods.—(1.) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2.) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

Section 6.—Undivided Shares.—(1.) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2.) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite num-

ber, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

Section 7.—Destruction of Goods Sold.—(1.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(a.) As avoided, or

(b.) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Section 8.—Destruction of Goods Contracted to be Sold.—(1.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the

goods perish, or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—

(a.) As avoided, or

(b.) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

THE PRICE

Section 9.—**Definition and Ascertainment of Price.**—

(1.) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2.) The price may be made payable in any personal property.

(3.) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 10.—Sale at a Valuation.—(1.) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

CONDITIONS AND WARRANTIES

Section 11.—Effect of Conditions.—(1.) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the non-performance of the condition as a breach of warranty.

Seller allowed to refuse delivery of current installments until buyer had paid sums already due according to contract. *Nat'l Contracting Co. v. Vulcanite etc. Co.*, 192 Mass. 247.

Sec. 11 (1), first part, applied, *Brought v. Redewell Music Co.*, 17 Ariz. 393; *Potter Press Co. v. Newark Daily etc. Co.*, 82 N. J. L. 671.

Seller is not in default until buyer has performed conditions precedent to seller's liability. *Murphy v. Moon Motor Car Co.*, 131 N. Y. S. 873.

(2.) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

Whether or not buyer had reasonable time in which to test the goods left to the jury. *Fechteler v. Whittemore*, 205 Mass. 6.

Description of cloth to be manufactured identifies the subject matter of the contract and seller can not recover without proof that he tendered cloth conforming to this description. This condition precedent to recovery called a "warranty." *Putnam-Hooker Co. v. Hewins*, 204 Mass. 426.

Section 12.—Definition of Express Warranty.—Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural

tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

Section 13.—Implied Warranties of Title.—In a contract to sell or a sale, unless a contrary intention appears, there is—

(1.) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods at the time when the property is to pass;

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale;

(3.) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4.) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law, goods in which a third person has a legal or equitable interest.

Followed, *Hartley v. Rotman*, 200 Mass. 372.

An outstanding mortgage of which buyer knows is not a breach of implied warranty of title; Act not mentioned. *Dreisbach v. Eckelkamp*, 82 N. J. L. 726.

Warranty of title is not negated by seller's lack of possession. *Kirkpatrick v. Kepler*, 164 Wis. 558.

Section 14.—Implied Warranty in Sale by Description.—Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the

sample if the goods do not also correspond with the description.

The warranty implied from description may be negatived by express statement that there is no warranty; also by a known custom among dealers to refuse a warranty. *Ross v. Northrup & Co.*, 156 Wis. 327.

Declared to be a mere codification of the common law, *Lissberger v. Kellogg*, 78 N. J. L. 85.

Section 15.—Implied Warranties of Quality.—Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2.) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3.) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4.) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6.) An express warranty or condition does not nega-

tive a warranty or condition implied under this act unless inconsistent therewith.

(1.) Followed and applied, *Brought v. Redewill Music Co.*, 17 Ariz. 393.

(1.) There is an implied warranty that a machine built for a special purpose will do the work expected of it. Act not mentioned. *Kelsey v. J. W. Ringrose Co.*, 152 Wis. 499.

A warranty of quality may be implied by custom even when the sale is of specific articles. *Proctor v. Atlantic Fish Co.*, 208 Mass. 351.

(1.) (3.) One who bought chops from a butcher, allowing the butcher to select them, held to have so relied on the seller's knowledge as to raise an implied warranty of their fitness for food. *Gearing v. Berkson*, 223 Mass. 257.

(6.) Accord, warranty of merchantability implied; Act not mentioned. *Wolverine Spice Co. v. Fallow*, 182 Mich. 361.

(1.) There is no implied warranty of fitness in a sale of specific goods by one dealer in meats to another such dealer. *Baker v. Kamantowsky*, 188 Mich. 589.

Followed, *Pentland v. Jacobson*, 189 Mich. 339.

(4.) Sale of coal under a trade name does not imply any fitness for purpose for which seller is aware that buyer intends it. Based on common law as well as Act. *Quemahoning Coal Co. v. Sanitary etc. Co.*, 88 N. J. L. 174.

The furnishing of food in a restaurant is not a "sale" and therefore sec. 15 of the Act does not apply. *Merrill v. Hodson*, 88 Conn. 314.

There is no implied warranty of fitness for purpose where article is specific and parties deal on equal terms; Act not mentioned. *Commercial Realty Co v. Dorsey*, 114 Md. 172.

(1.) Seller of ice cream held impliedly to have warranted it fit for consumption. *Race v. Krum*, 147 N. Y. S. 818.

Sale of a stallion for breeding purposes; seller not himself a breeder of horses. Held, no implied warranty of fitness; Act not mentioned. *Thompson v. Miser*, 82 O. S. 289.

Sale of preserve jar caps under trade name of "Sure-Seal" does not imply any warranty of fitness for known purpose. *Sure Seal Co. v. Loeber*, 157 N. Y. S. 327.

"Gasoline" is a generic name and a sale thereof does not negative an implied warranty of fitness. *Berry v. Wadhams Oil Co.*, 156 Wis. 588.

Sale of vacuum cleaners under a trade name gives rise to no implied warranty of fitness. *Ohio Elec. Co. v. Wisconsin etc. Co.*, 161 Wis. 632.

SALE BY SAMPLE

Section 16.—Implied Warranties in Sale by Sample.—
In the case of a contract to sell or a sale by sample:

(a) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(c) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

(c.) Followed, on common law authority, *West End Mfg. Co. v. Warren Co.*, 198 Mass. 320.

Applied, *Gascoigne v. Cary Brick Co.*, 217 Mass. 302.

Promise of seller to furnish goods like sample called an "implied" warranty that they should be like sample. *Borden v. Fine*, 212 Mass. 425.

Inference that goods corresponding to sample were promised by seller held negated by other circumstances of the agreement. *Androvette v. Parks*, 207 Mass. 86.

Sale of potatoes "like sample". Bulk of the potatoes were in fact like sample, but sample itself was unmarketable, although this was not discernible by the buyer on ordinary inspection. Held, breach of *implied* warranty of merchantability. *Steward v. Voll & Son*, 81 N. J. L. 323.

Sale of "pussy willow" satin, "as is," "like sample". Goods delivered were not like sample. Held term "as is" was not inconsistent with "like sample" and there was a breach of obligation. *Schwartz v. Kohn*, 155 N. Y. S. 547.

PART II

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER

Section 17.—No Property Passes Until Goods are Ascertained.—Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

The goods sold may be ascertained by linear delimitation on a larger mass even though there be no physical separation. *Carroll v. Haskins*, 212 Mass. 593.

Title to such part of goods contracted for as is specific passes at

once; title to such part as is not specific does not pass until specification. *Bondy v. Hardina*, 216 Mass. 44.

Section 18.—Property in Specific Goods Passes When Parties so Intend.—(1.) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

"The words, 'I hereby transfer my full right of ownership of * * *', would not be conclusive of the title in the defendant in error even if they were unqualified; because their effect must be determined by the intention of the parties as disclosed by a consideration of all the facts and circumstances of the transaction." *Piano Co. v. Piano Co.*, 85 O. S. 196.

In *Cassinelli v. Humphrey Supply Co.*, 43 Nev. 208, 183 Pac. 523, property described as "all my hay except 30 tons" was held "specific and ascertained" within the meaning of this section—a somewhat surprising use of the terms.

Seller's intent to pass title is as essential as buyer's intent to receive it. *Atlantic Bldg. Supp. Co. v. Vulcanite etc. Co.*, 203 N. Y. 133, 96 N. E. 370.

Applied, *White v. Lansing Chem. Co.*, 92 Conn. 186; *Dinsmore v. Maag-Wohmann Co.*, 122 Md. 177; *Wilson v. International Ry. Co.*, 160 N. Y. S. 367.

Section 19.—Rules for Ascertaining Intention.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

"It may be conceded that as between the parties where there has been a sale of specific goods, and especially where the price has been paid, the title will pass without a delivery of the goods." *Piano Co. v. Piano Co.*, 85 O. S. 196.

Recognized as rules of presumption only, *Cassinelli v. Humphrey Supply Co.*, 43 Nev. 208, 183 Pac. 523.

Title does not pass if anything remains to be done by the seller to ascertain the total price, *Elder v. Insurance Co.*, 206 Ill. App. 172.

Rule 2.—Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Automatic Co. v. Automatic Co., 208 Mass. 252, 94 N. E. 462, sale of "specific goods" to be completed. Held, no title passed till completion, despite words of present sale. Provision of Act said to be an enactment of the common law. Distinguishes prior cases wherein evident intent was to sell goods in unfinished state, with a collateral contract to complete them.

Title does not pass if something remains to be done by seller to ascertain total price, *Elder v. Ins. Co.*, 206 Ill. Ap. 172.

A rule of presumption only, *Wright v. Frank A. Andrews Co.*, 212 Mass. 186, 98 N. E. 798.

It will be noted that the Act does not state any presumption as arising from fact that seller has reserved right to measure goods to determine total price. In this respect it differs from the English Sales Act. The draftsman of the American Act, Mr. Samuel Williston, is of opinion that the presumption of intent not to pass title in such case is irrational and unsound. The Act is, therefore, probably intended to exclude such a presumption. No court has passed on it to the writer's knowledge. The nearest approach is *Elder v. Insurance Co.*, 206 Ill. Ap. 172, which rather confusedly lays down the common law presumption as *dictum*, but does not refer to the Act.

Rule 3.—(1.) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

Declaratory of the common law. *Geo. A. Ohl & Co. v. Barnet Co.*, 88 N. J. L. 45, 93 Atl. 715.

Does not apply where there is no contract of sale at all, but delivery of possession is made only with the idea of eventually negotiating a sale, *Fox v. Proctor*, 145 N. Y. S. 709, 160 App. Div. 12.

Applied, *Siegel v. Union Ass. Co.*, 152 N. Y. S. 662, 90 Misc. 550.

(2.) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b.) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Applied, *Emery Thompson Co. v. Graves*, Conn., 98 Atl. 331; *Rice v. Dinsmore*, 124 Md. 276, 92 Atl. 847; *Dinsmore v. Rice*, 128 Md. 209, 97 Atl. 537.

Rule 4.—(1.) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

The word "appropriate", as here used undoubtedly connotes intent to pass the title as well as intent to identify property to which the contract is to apply. The section, therefore, does not offer any solution of the question as to when such intent may be assumed to exist.

Title does not pass to unascertained goods. *Chandler etc. Co. v. Shea*, 213 Mass. 398, 100 N. E. 663; *Bondy v. Hardina*, 216 Mass. 44, 102 N. E. 935.

The seller must intend to pass title as well as the buyer to take it. *Atlantic Bldg. Supp. Co. v. Vulcanite etc. Co.*, 203 N. Y. 133, 96 N. E. 370.

(2.) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he

is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Title passed on delivery to the carrier, *Engemann v. D. L. & W. R. R.*, 88 N. J. L. 45, 97 Atl. 152; *State v. Buyer*, 93 O. S. 72, 112 N. E. 197.

Buyer is liable in case of loss, "not only on general principles of law, but under Sales Law, sec. 127," *Schanz v. Bramwell*, 143 N. Y. S. 1057.

Goods not conforming to the contract were delivered to the carrier and rejected by the buyer. Held "title never passed to" buyer and he was not responsible for their safe return to seller, *Dube v. Liberty Clothing Co.*, 153 N. Y. S. 577, 91 Misc. 64.

Seller can not after delivery to carrier, by changing consignment, retake title. *McCollom v. Minn. etc. Ry. Co.*, 152 Wis. 435, 139 N. W. 1129.

Delivery to a local express company named by buyer held to pass title, *Levy v. Radkay*, 233 Mass. 29, 123 N. E. 97.

Title to goods, not identified at the making of the contract, was held to have passed to the buyer through the seller's delivery to a carrier, notwithstanding that the buyer had "attempted to repudiate" the contract before shipment. *Home Pattern Co. v. Mertz*, 88 Conn. 22, 90 Atl. 33. This is utterly inconsistent with the rule that title will not pass without buyer's consent. See discussion in text of seller's right of action for purchase price.

In sale of oil to be manufactured, held that title passed on delivery into cars furnished by buyer even though seller then consigned the cars to other persons. Held also that title passed when oil was placed in seller's own tanks, contract providing that if buyer failed to provide cars, seller should place the oil in its tanks for buyer. *Proctor & Gamble Co. v. Peters, White & Co.*, 176 N. Y. S. 169.

Rule 5.—If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Goods were sold at a stated price "less freight". Buyer refused to accept goods which were shipped freight collect. Action to recover

contract price. Held title had passed to buyer because "while the amount undoubtedly measured what the buyer would have to pay for carriage, the stipulation could be found to have been intended by the parties as a discount from the seller's regular prices, and not as a prepayment of the freight. The question was one of fact." *Twitchell-Champlin Co. v. Radowsky*, 207 Mass. 72.

Whether or not the seller is to deliver to a particular place and who is to pay the freight are questions for the jury, *Engeman v. D. L. & W. R. R.*, 88 N. J. L. 45, 97 Atl. 152.

Garven v. N. Y. C. & H. R. R. R., 210 Mass. 275, title still in seller so that he could sue carrier for negligence, despite delivery to carrier and taking of bill of lading in buyer's name, because seller had obligated himself to deliver to buyer. See also, *Barrie v. Quimby*, 206 Mass. 259, 92 N. E. 451.

Helbum Leather Co. v. Stone, 205 Ill. App. 347, title held to have passed to buyer on arrival of goods in the city named as place of delivery, without actual delivery of possession to buyer by the carrier.

Fact that carrier got its boat with the goods aboard to buyer's dock but was unable to land because dock was already occupied, did not constitute a delivery so as to make buyer liable for loss, *Westmoreland Coal Co v. Syracuse Ltg. Co.*, 145 N. Y. S. 420, 159 App. Div. 323.

Delivery to an express company is not delivery to the buyer under this section, *Hauptman v. Miller*, 157 N. Y. S. 1104, 94 Misc. 266, and seller can sue the express company, *Conroy v. Barrett*, 158 N. Y. S. 549, 95 Misc. 247.

Plaintiff sold codfish to defendant "C. I. F."—which was interpreted to mean that the agreed price covered cost of transportation and insurance. Plaintiff took out bill of lading in his own name. Held, fact that seller was to insure was evidence of the "different intention" referred to in §19, and title passed despite seller's obligation to pay freight. *Smith Co. v. Marano*, 267 Pa. 107, 110 Atl. 94, 10 A. L. R. 697.

Section 20.—Reservation of Right of Possession or Property When Goods Are Shipped.

(1.) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

If sale is of specific goods title passes before shipment and a subsequent taking of bill of lading in seller's name "can not reserve a title," but only "the *jus disponendi*." Even a real reservation of "title" by taking bill of lading in seller's name puts the risk of loss on the buyer, because of section 22 of the Act, read in connection with section 20. *Alderman Bros. Co. v. Westinghouse etc. Co.*, 92 Conn. 419, 103 Atl. 267.

Plaintiff, as seller, had shipped melons according to contract, f. o. b. place of shipment, bill of lading making them deliverable to himself. The melons rotted while in transit. Held, the title was in the seller and the risk of loss on him. No reference was made to the Act and the court cited such authorities as *Pittsburgh etc. Co. v. Cudahy Packing Co.*, 260 Pa. 135, in which it was held that title and risk of loss were seller's, because of seller's unfulfilled obligation to deliver. *Gilbert v. Ayoub*, 71 Pa. Sup. Ct. 336.

Unspecific goods sold, seller obligated to deliver at buyer's town; goods shipped by bill of lading in name of seller's agent; bill of lading presented but neither paid nor refused; goods destroyed; held "title" was in buyer and, also, risk of loss was on him. *Kinney v. Horwitz*, 93, Conn. 211, 105 Atl. 438. It may be observed that adoption of the Act has not altogether produced consistent or logical decisions.

Goods were shipped by bill of lading in seller's name and bill of lading with draft attached sold to a bank. *Dictum* to effect that bank could sue carrier in a titular action. Act not referred to. *Peninsular Bk. v. Citizen's Nat'l Bk.*, 186 Ia. 418, 172 N. W. 293.

In *Boss v. Hutchinson*, 169 N. Y. S. 513, the seller's taking the bill of lading in his own name was held to be a reservation of "property and possession." The buyer paid the contract price under protest. On suit he claimed this payment to have been under duress.

Held, the buyer was not under duress in making the payment, as is the case where one pays to get possession of his own goods, because they were not the buyer's goods. *Accd., Rylance v. Jas. Walker Co., 129 Md. 475, 99 Atl. 597.*

Risk of loss on buyer despite seller's reservation of title through taking bill of lading in his own name. Had been previously decided, however, that title had in fact passed to buyer. *Smith Co. v. Marano, 267 Pa. 107, 110 Atl. 94, 10 A. L. R. 697.*

See also the Uniform Bills of Lading Act, Section 40.

(4.) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Section 21.—Sale by Auction.—In the case of sale by auction—

(1.) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3.) A right to bid may be reserved expressly by or on behalf of the seller.

(4.) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

Section 22.—Risk of Loss.—Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that—

(a.) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(b.) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

TRANSFER OF TITLE

Section 23.—Sale by a Person Not the Owner.—(1.) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Nothing in this act, however, shall affect—

(a.) The provisions of any factors' acts, recording

acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b.) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

This does not change the common law rule in respect to sale of negotiable instruments. *Pratt v. Higginson*, 230 Mass. 256, purchaser of stolen bonds protected. *Brown v. Perera*, 176 N. Y. S. 215, purchaser of stolen foreign money protected.

Entrusting a chauffeur with possession of automobile for purpose of shipment to another place does not permit the chauffeur to vest title in a bona fide purchaser. *Canales v. Earl*, 168 N. Y. S. 725.

One who has a voidable title, secured by fraud, can vest a purchaser without notice of the defect with a good title, citing *Kingsford v. Merry*, 1 H. & N. 503; *B. & O. S. W. Ry. v. Good*, 82 O. S. 278, 92 N. E. 435.

One who buys goods from a thief and sells them himself is liable to the true owner for conversion. *Reichard v. Hutton*, 142 N. Y. S. 935, 158 App. Div. 122.

Section 24.—Sale by One Having a Voidable Title.—

Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

One who took the goods in good faith, but in payment of a pre-existing debt, was held not to be within this rule (the Act was not expressly mentioned). *W. G. Ward Co. v. American etc. Co.*, 247 Pa. 267.

Section 25.—Sale by Seller in Possession of Goods Already Sold.—Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

In *Urbansky v. Kutinsky*, 86 Conn. 22, where the action was between the parties themselves, it was left to the jury to say whether title had not passed despite the seller's retention of actual possession. The act was not mentioned in this connection.

As between the parties, title passes, *Patchin v. Rowell*, 86 Conn. 372, 85 Atl. 511; *Hallet & Davis Piano Co. v. Starr Piano Co.*, 85 O. S. 196, 97 N. E. 377.

As to third parties, "It is the general holding that there must be not only a delivery to the vendee claiming the goods, but there must be an actual and visible change of possession." Act not cited. *Hallet & Davis Piano Co. v. Starr Piano Co.*, 85 O. S. 196, 97 N. E. 377.

Section 26.—Creditors' Rights Against Sold Goods in Seller's Possession.—Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

Title passes as between the parties despite seller's retention of possession, but "can not stand against a subsequent attaching creditor without notice." *Patchin v. Rowell*, 86 Conn. 372, 85 Atl. 511.

Section 27.—Definition of Negotiable Documents of Title.—A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

A certificate of stock is not within the meaning of this Act. *Millard v. Green*, Conn., 110 Atl. 177, 9 A. L. R. 1610.

Section 28.—Negotiation of Negotiable Documents by Delivery.—A negotiable document of title may be negotiated by delivery,—

(a.) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b.) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified per-

son, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Section 29.—Negotiation of Negotiable Documents by Indorsement.—A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Section 30.—Negotiable Documents of Title Marked “Not Negotiable.”—If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words “not negotiable,” “non-negotiable” or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words “not negotiable,” “non-negotiable,” or the like.

Section 31.—Transfer of Non-Negotiable Documents.—A document of title which is not in such form that it can

be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document can not be negotiated and the indorsement of such a document gives the transferee no additional right.

Section 32.—Who May Negotiate a Document.—A negotiable document of title may be negotiated—

(a.) By the owner thereof, or

(b.) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

Section 33.—Rights of Person to Whom Document has Been Negotiated.—A person to whom a negotiable document of title has been duly negotiated acquires thereby,

(a.) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

The Uniform Bills of Lading Act goes further and provides that he shall have such title as the consignor and consignee had power to convey.

(b.) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

Section 34.—Rights of Person to Whom Document Has Been Transferred.—A person to whom a document of

title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Section 35.—Transfer of Negotiable Document Without Indorsement.—Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Section 36.—Warranties on Sale of Document.—A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

- (a.) That the document is genuine;
- (b.) That he has a legal right to negotiate or transfer it;

(c.) That he has knowledge of no fact which would impair the validity or worth of the document, and

(d.) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Section 37.—Indorser Not a Guarantor.—The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

Section 38.—When Negotiation Not Impaired by Fraud, Mistake or Duress.—The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

Applied, *Roland M. Baker Co. v. Brown*, 214 Mass. 196, 100 N. E. 1025; *Commercial Bank v. Canal Bank*, 239 U. S. 520, 36 Sup. Ct. Rep. 194.

Section 39.—Attachment or Levy Upon Goods for Which a Negotiable Document Has Been Issued.—If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they can not thereafter, while in the possession of such bailee, be at-

tached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

Section 40.—Creditors' Remedies to Reach Negotiable Documents.—A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process.

PART III

PERFORMANCE OF THE CONTRACT

Section 41.—Seller Must Deliver and Buyer Accept Goods.—It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

Section 42.—Delivery and Payment are Concurrent Conditions.—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

A codification of the common law, *Gruen v. Geo. A. Ohl & Co.*, 81 N. J. L. 626, 80 Atl. 547; *British Aluminum Co. v. Trefts*, 148 N. Y. S. 144, 163 App. Div. 184.

Section 43.—Place, Time and Manner of Delivery.—
(1.) Whether it is for the buyer to take possession of

the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2.) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of, and incidental to, putting the goods into a deliverable state must be borne by the seller.

Section 44. — Delivery of Wrong Quantity. — (1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods

delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Applied, Rock Glen Salt Co. v. Segal, 229 Mass. 115, 118 N. E. 239; *Boyd v. Second-hand Supply Co.*, 14 Ariz. 36, 123 Pac. 619; *Powers v. Dodgson*, 194 Mich. 133, 160 N. W. 432, (sub-sec. 3).

"Used and disposed of", in sub-sec. 1, "means something more than merely accepting. It contemplates a situation in which the buyer cannot return the goods to the seller." Hence, offering goods for resale, but without succeeding in reselling does not preclude a rejection by the buyer. *Kinschman v. Crawford Plummer Co.*, 150 N. Y. S. 886, 165 App. Div. 259.

A tender of 81 pieces to a buyer who has ordered only 50 pieces may be refused by the buyer; Act not referred to. *Galland v. Kass*, 152 N. Y. S. 1074.

Failure to tender full amount may be acquiesced in by buyer and justified by course of dealing; Act not cited. *Monroe v. Trenton Co.*, (N. Y.) 206 Fed. 456.

Section 45.—Delivery in Instalments.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects

or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

Section 46.—Delivery to a Carrier on Behalf of the Buyer.—(1.) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, Rule 5, or unless a contrary intent appears.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

Section 47.—Right to Examine the Goods.—(1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable

opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

As to what is an inspection, Act not mentioned, see *Mosler Safe Co. v. Thore*, 217 Mass. 153.

Title did not pass, despite delivery to carrier, before buyer's inspection, and seller could sue carrier in tort. This interpretation—not being limited to cases where goods delivered did not conform to contract—conflicts with the rule that title presumably passes on delivery to a carrier of goods conforming to the carrier. There is no discussion and the holding seems to be for a special purpose. *Garvan v. N. Y. C. & H. R. R.*, 210 Mass. 275.

In *D. L. & W. Ry. Co. v. United States*, 231 U. S. 363 (N. Y. Dist.), the court held that title passed to the buyer on mere receipt by him of the goods, subject to "rescission" by him if inspection showed non-conformity with the contract. Here again the conclusion was obviously reached, regardless of precedent, for the particular purpose of the case.

In *Urbansky v. Kutinsky*, 86 Conn. 22, the common law rule is clearly followed and an agreement to take an existing and definitely identified chattel was held to preclude any right of inspection as a precedent to the passing of title.

Applied, Bridgeport Hardware Co. v. Bouniol, 89 Conn. 254.

Buyer's receipt of goods and retention of them without inspection, or reason for not inspecting, held to constitute an acceptance of title. *Fort Wayne Printing Co. v. Hurley-Reilly Co.*, 163 Wis. 179; *Gerli & Co. v. Mistletoe Silk Mills*, 80 N. J. L. 128.

Seller can not recover price without proof that he has offered to buyer delivery of goods which conform to the requirements of the contract. *Alamo Cattle Co. v. Hall*, 220 Fed. (Arizona) 832.

An acceptance after inspection in which a material error was made, without fault of the buyer, may be set aside and, at least, the seller's right to recovery made to depend on a new inspection. *Herman H. Hettler Lumber Co. v. Olds*, 221 Fed. (Mich.) 612.

(3.) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or other-

wise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Section 48.—What Constitutes Acceptance.—The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Use of part of goods, under entire contract, after knowledge that the other part was unsatisfactory amounts to acceptance of the whole. *Emery Thompson etc. Co. v. Graves*, 91 Conn. 71, 98 Atl. 331.

Applied to question of acceptance for purpose of satisfying Statute of Frauds, *DeNunzio v. DeNunzio*, 90 Conn. 342, 97 Atl. 323.

Retention and use for two years after knowledge of defect is acceptance, but recovery of damages is allowed. *Otis Elevator Co. v. Headley*, 81 N. J. L. 173, 80 Atl. 109.

Right to "rescind" lost by use after knowledge of defect, *Gerli & Co. v. Mistletoe Silk Mills*, 83 N. J. L. 7, 84 Atl. 1065; *Emert v. Niblink*, 179 Mich. 335, 146 N. W. 120.

Whether or not there has been actual acceptance and whether there has been an unreasonable delay are questions for the jury. *Hayes v. Kluge*, 86 N. J. L. 657, 92 Atl. 358.

What acts amount to acceptance is a question for the court. *Rudolph Wurlitzer Co. v. United etc. Co.*, 87 N. J. L. 656, 94 Atl. 630, *semble*.

"Reasonable time" is a question of law when the facts are undisputed. *Am. Steam etc. Co. v. Mechanics etc. Co.*, 214 Mass. 299, 101 N. E. 376.

Section 49.—Acceptance Does Not Bar Action for Damages.—In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought

to know of such breach, the seller shall not be liable therefor.

If the buyer does waive breach of condition and accept title to the goods tendered, he must then rely on recovery of damages for breach of warranty and can not set up failure of consideration, or non-acceptance. *Potter Press Co. v. Newark etc. Co.*, 82 N. J. L. 671, *dictum*.

Acceptance of goods despite a breach of condition precludes any recovery, as by way of set off or recoupment, by the buyer. Placed on common law precedents; Act not mentioned. *Cheboygan Paper Co. v. Eichberg*, 184 Mich. 30.

An implied warranty does not survive acceptance; Act not mentioned and no authority cited. *Ferguson v. Netter*, 204 N. Y. 505, 98 N. E. 16.

Express warranty does survive acceptance; Act not mentioned. *Condit v. Onward Const. Co.*, 210 N. Y. 88, 103 N. E. 886.

Rescission and return of the goods are inconsistent with acceptance and recovery of damages. *Gerli & Co. v. Mistletoe Silk Mills*, 80 N. J. L. 128, 76 Atl. 335.

Applied, *Gascoigne v. Cary Brick Co.*, 217 Mass. 302, 104 N. E. 734.

Section 50.—Buyer Is Not Bound to Return Goods Wrongly Delivered.—Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

Section 51.—Buyer's Liability for Failing to Accept Delivery.—When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

PART IV

RIGHTS OF UNPAID SELLER AGAINST THE GOODS

Section 52.—Definition of Unpaid Seller.—(1.) The seller of goods is deemed to be an unpaid seller within the meaning of this act—

(a.) When the whole of the price has not been paid or tendered.

(b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2.) In this part of this act the term “seller” includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

Section 53.—Remedies of an Unpaid Seller.—(1.) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has—

(a.) A lien on the goods or right to retain them for the price while he is in possession of them;

(b.) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(c.) A right of resale as limited by this act;

(d.) A right to rescind the sale as limited by this act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

UNPAID SELLER'S LIEN

Section 54.—When Right of Lien May Be Exercised.—

(1.) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a.) Where the goods have been sold without any stipulation as to credit;

(b.) Where the goods have been sold on credit, but the term of credit has expired;

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Section 55.—Lien After Part Delivery.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

Section 56.—When Lien Is Lost.—(1.) The unpaid seller of goods loses his lien thereon—

(a.) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

(b.) When the buyer or his agent lawfully obtains possession of the goods;

(c.) By waiver thereof.

Lien lost by carrier's authorized delivery to buyer even though freight charges were not paid. *Norfolk Hardwood Co. v. N. Y. C. R. R.*, 202 Mass. 160.

Delivery of possession of negotiable warehouse receipts is delivery of the goods so as to terminate lien. *Rummell v. Blanchard*, 216 N. Y. 348, *Id.* 153 N. Y. S. 159.

When lien is lost by delivery of possession it is not revived by buyer's subsequent return of possession and refusal to pay. *Northern Grain Co. v. Whiffler*, 153 N. Y. S. 723.

(2.) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

Capriano v. Italian Importing Co., 151 N. Y. S. 994.

STOPPAGE IN TRANSITU

Section 57—Seller May Stop Goods on Buyer's Insolvency.—Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

Right of stoppage *in transitu* does not exist where there is no transit; it can not be invoked where goods have been put in possession of a warehouseman merely as such. Rummell v. Blanchard, 216 N. Y. 348.

Term "stoppage *in transitu*" as used in Act, compared with broader, loose usage, Boyd v. Secondhand Supply Co., 14 Ariz. 36.

Section 58.—When Goods Are in Transit.—(1.) Goods are in transit within the meaning of section 57—

(a.) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b.) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2.) Goods are no longer in transit within the meaning of section 57—

(a.) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to

the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(c.) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

(3.) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(4.) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

Termination of the transit is a question of fact, rather than law, and termination is not necessarily shown by fact that goods had reached destination, buyer had inspected them and taken samples and carrier had notified buyer that storage charges were running against the goods. *Coleman v. N. Y., N. H. & H. R. R.*, 215 Mass. 45. Cf. *Norfolk Hardwood Co. v. N. Y. Cent. R. R.*, 202 Mass. 160.

Buyer turned his bill of lading in to the railroad company and it was stamped "cancelled by delivery," although the goods never actually left the carrier's possession. Held, this terminated the seller's right of stoppage even though the buyer later rejected the goods, got his bill of lading back from the carrier and had the "cancelled" stamp scratched off. *Northern Grain Co. v. Whifler*, 153 N. Y. S. 723.

Section 59.—Ways of Exercising the Right to Stop.—

(1.) The unpaid seller may exercise his right of stoppage *in transitu* either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and

under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2.) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

Transfer by buyer to a sub-buyer of a non-negotiable bill of lading does not defeat the seller's right of stoppage *in transitu*; the words "non-negotiable" stamped on the bill put the sub-buyer on notice. *Gass v. Southern Pacific Co.*, 137 N. Y. S. 261.

RESALE BY THE SELLER

Section 60.—When and How Resale May Be Made.—

(1.) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods *in transitu* may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3.) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon

an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4.) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5.) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

RESCISSION BY THE SELLER

Section 61.—When and How the Seller May Rescind the Sale.—(1.) An unpaid seller having a right of lien or having stopped the goods *in transitu*, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

Seller still in possession of ring held liable to buyer for conversion and breach of contract for refusal to deliver on buyer's tender of price, even though the buyer had failed to pay for many months after the sale and had even written a letter suggesting that the transaction be rescinded, the seller never having shown any intent to rescind. *Wright v. Andrews*, 212 Mass. 186.

Resale without public auction upheld, *Tyng & Co. v. Woodward*, 121 Md. 422; *Id.*, 123 Md. 98.

Section 62.—Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.—Subject to the provisions of this act, the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage *in transitu* shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage *in transitu*.

A provision of the English Act, similar to the first paragraph is interpreted as to the meaning of "assent" in *Mordaunt Brothers v. The British Oil etc. Co.*, (1910) 2 K. B. 502.

The question raised in the text as to the effect of transfer of a bill of lading, after the original seller had actually reacquired possession is possibly answered by Section 59 (2), "If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation." Transfer of a non-negotiable bill does not defeat right to stop. *Gass v. Southern Pacific Rr. Co.*, 137 N. Y. S. 261.

PART V

ACTIONS FOR BREACH OF THE CONTRACT

REMEDIES OF THE SELLER

Section 63.—Action for the Price.—(1.) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3.) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

Buyer refused to accept goods not specified at time of contract. Seller was allowed to sue for entire purchase price, on the authority of *Van Brocklen v. Smeallie*, 140 N. Y. 70, the Act not being mentioned. *Storm v. Rosenthal*, 141 N. Y. S. 339. Right to sue, regardless of passage of title by agreement, stated, without reference to the Act, *Rylance v. Jas. Walker Co.*, 129 Md. 475, 99 Atl. 597.

Section 64.—Action for Damages for Non-Acceptance of the Goods.—(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price

and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4.) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

Section 65.—When Seller May Rescind Contract or Sale.—Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

Applies to anticipatory breach by buyer, *Wetkopsky v. New Haven Gas Light Co.*, 90 Conn. 286, 96 Atl. 960.

REMEDIES OF THE BUYER

Section 66.—Action for Converting or Detaining Goods.—Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

Section 67.—Action for Failing to Deliver Goods.—
(1.) Where the property in the goods has not passed to

the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Act codifies the common law rule, *Banks v. Warner*, 85 Conn. 613, 84 Atl. 325.

Although the act fixes the measure of damages it does not constitute them liquidated damages within the meaning of a statute permitting set-off of liquidated damages. *Westminster Metal etc. Co. v. Coffman*, 123 Md. 619, 91 Atl. 716.

The market value at places other than that of delivery may be shown under proper circumstances. *U. S. Commercial Co. v. Joachimstahl*, — N. J. —, 72 Atl. 46.

The price actually paid by the buyer in getting other goods in place of those contracted for does not necessarily show the market price nor fix the damages. *Sauer v. McClintic etc. Co.*, 179 Mich. 618, 146 N. W. 422.

The fact that the buyer has made a contract to resell at a profit, if unknown to the seller, is not such a "special circumstance" as will change the measure of damage fixed by sub-section 3. *Pope v. Ferguson*, 82 N. J. L. 566, 83 Atl. 353.

Special cause of damage must have been within the seller's contemplation to be ground for a recovery. *Arizona Power Co. v. Racine Sattley Co.*, 13 Ariz. 283, 114 Pac. 558.

"The circumstances of each case must determine what measure of damages should apply, having in view always the giving of actual compensation for actual loss," *McFadden v. Shanley*, 16 Ariz. 91, 141 Pac. 732, citing common law authority; *Hanson & Parker v. Wittenberg*, 205 Mass. 319, 91 N. E. 383.

Section 68.—Specific Performance.—Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity

may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

Section 69.—Remedies for Breach of Warranty.—(1.) Where there is a breach of warranty by the seller, the buyer may, at his election—

(a.) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

(b.) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c.) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d.) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

Option of rescinding contract for unspecific goods or of keeping the goods tendered and suing for damages allowed, on common law authorities. *Borden v. Fine*, 212 Mass. 425.

Plaintiff agreed to sell "draft arms" which would serve to draw both still and live beer from the same keg, said arms to be made according to a special design which the plaintiff submitted to the buyer. Some arms were received and part of the price paid. The arms did not accomplish the purpose contemplated by the contract. On suit by the seller for the rest of the price the defendant claimed the right of avoiding the contract and recovering the money already paid, on the ground that the seller in stating that the arms would serve the purpose contemplated had been guilty of fraud in law (although admittedly not of fraud in fact). The defendant does not seem to have based his contention on this section, 69 (1) (d), which seems obviously apt, and the court made no mention of it in denying the right to rescind, saying that the seller's representation was a mere statement

of *opinion* as to what arms such as they had designed ought to do. *Am. Soda Fountain Co. v. Spring Water Co.*, 207 Mass. 488.

(2.) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

Breach of condition, or warranty, in one contract does not justify buyer in refusing to continue with an other contemporaneous but distinct contract. *Hanson v. Wittenberg*, 205 Mass. 319.

Section 69 (2.) Buyer who has rescinded for breach can not also have damages. *Gerli & Co. v. Mistletoe Silk Co.*, 80 N. J. 128.

(3.) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

Accord as to remedies and effect of unreasonable delay, but Act not mentioned and common law cases cited. Question of unreasonable delay held properly decided by court. *Kelsey v. J. W. Ringrose Co.*, 152 Wis. 499.

Right of rescission not lost by use without knowledge of the seller's failure to perform, act not mentioned. *Enterprise Mfg. Co. v. Oppenheim*, 114 Md. 368.

Acceptance of one installment with knowledge that it was deficient in quantity precludes rescission of contract and rejection of other installments. *Craig v. Lane*, 212 Mass. 195.

Acceptance with knowledge of defects precludes rescission, *Puffer Mfg. Co. v. Krum*, 210 Mass. 211.

Accord, *Schindler v. Sperling*, 155 N. Y. S. 348.

Resale of perishable goods by the buyer as agent *ex necessitate* of the seller is not an acceptance of the goods by the buyer. *Descalzi Fruit Co. v. Sweet*, 30 R. I. 320.

Applied, *Skillings v. Collins*, 224 Mass. 275.

Cf. *Erwin v. Detwiler*, 75 N. J. L. 420.

(4.) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for

the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5.) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6.) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7.) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Left to jury to say whether express warranty was made or not, *Gascoine v. Carey Brick Co.*, 217 Mass. 304.

An express warranty may be merged into a subsequent contract in such a way as to be eliminated. *Hamilton Iron etc. Co. v. Groveland etc. Co.*, 233 Fed. (Ohio) 388.

Interpretation of an express warranty that a horse is "sound," *Andrews v. Peck*, 83 Conn. 666.

An express warranty that chattel is in good condition can not be pleaded in same count with a promise to keep in repair. *White Auto. Co. v. Dorsey*, 119 Md. 251.

Breach of the warranty must be proved by the person relying on it. *Waterman v. School Dist.*, 182 Mich. 498.

Opinion distinguished, *Coleman v. Simpson Co.*, 147 N. Y. S. 865.

Provision that "any (nursery) stock which does not prove to be true to name as labeled is to be replaced free, or purchase price refunded" held not to limit seller's liability to replacement or cost price only. *Sanford v. Brown Bros. Co.*, 208 N. Y. 90.

Section 69 (6 and 7.) Accord, *Hanson v. Wittenberg*, 205 Mass 319.

Damage for failure to deliver fixed by market price of goods available at the place and time for delivery. *Fowler v. Gress Mfg. Co.*, 158 N. Y. S. 524.

Accord with act, *White Auto Co. v. Dorsey*, 119 Md. 251.

Section 69 (6.) Applied, *Foundry Co. v. Stone*, 92 O. S. 76.

Special damages allowed, *Glann v. White*, 181 Mich. 320, 148 N. W. 210.

Section 70.—Interest and Special Damages.—Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI

INTERPRETATION

Section 71.—Variation of Implied Obligations.—Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

Section 72.—Rights May Be Enforced By Action.—Where any right, duty or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

Section 73.—Rule for Cases Not Provided for by this Act.—In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Section 74.—Interpretation Shall Give Effect to Purpose of Uniformity.—This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it.

The meaning and effect of such provisions in Uniform Acts is discussed by Jacob Sichertman in 2 Am. Bar Assn. Jrnl. 60.

The marked diversity of decision under the Uniform Negotiable Instruments Act, is pointed out in 34 Repts. of Am. Bar Assn. 1030, 39 Id. 1065.

In *Pope v. Ferguson*, 82 N. J. L. 566, the court looked to the decisions in other jurisdictions with the express purpose of securing uniformity.

Section 75.—Provisions Not Applicable to Mortgages.—The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

Section 76.—Definitions.—(1.) In this act, unless the context or subject matter otherwise requires—

“Action” includes counterclaim, set-off and suit in equity.

“Buyer” means a person who buys or agrees to buy goods, or any legal successor in interest of such person.

“Defendant” includes a plaintiff against whom a right of set-off or counterclaim is asserted.

“Delivery” means voluntary transfer of possession from one person to another.

“Divisible contract to sell or sale” means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

“Document of title to goods” includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods,

or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

“Fault” means wrongful act or default.

“Fungible goods” means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

In *Gowd v. Healy*, 206 N. Y. 423, the contract was for fifty cases of wine out of a larger quantity, apparently of cases rather than of wine in bulk. It was held to be a sale of fungible goods.

“Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale.

“Goods” include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Corporate stock is goods, wares, and merchandises. *Laundry Co. v. Whitmore*, 92 O. S. 44.

“Order” in sections of this act relating to documents of title means an order by indorsement on the document.

“Person” includes a corporation or partnership, or two or more persons having a joint or common interest.

“Plaintiff” includes defendant asserting a right of set-off or counterclaim.

“Property” means the general property in goods, and not merely a special property.

“Purchaser” includes mortgagee and pledgee.

“Purchases” includes taking as a mortgagee or as a pledgee.

“Quality of goods” includes their state or condition.

“Sale” includes a bargain and sale, as well as a sale and delivery.

A contract obligating an agent to make a certain number of “sales” was held to refer only to effectuated transfers of title and

not to include contracts to transfer title. The act was not mentioned. *Hall v. French Am. Wine Co.*, 134 N. Y. S. 158.

“Seller” means a person who sells or agrees to sell goods, or any legal successor in the interest of such person.

“Specific goods” means goods identified and agreed upon at the time a contract to sell or a sale is made.

“Value” is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor.

(2.) A thing is done “in good faith” within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

(4.) Goods are in a “deliverable state” within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

Section 76a.—Act Does Not Apply to Existing Sales or Contracts to Sell.—None of the provisions of this act shall apply to any sale, or to any contract to sell, made prior to the taking effect of this act.

Section 76b.—No Repeal of Uniform Warehouse Receipt Act or Uniform Bills of Lading Act.—Nothing in this act or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the Act to Make Uniform the Law of Warehouse Receipts, or of the Act to Make Uniform the Law of Bills of Lading.

Section 77.—**Inconsistent Legislation Repealed.**—All acts or parts of acts inconsistent with this act are hereby repealed, except as provided in Section 76b.

Section 78.—**Time When the Act Takes Effect.**—This act shall take effect on the.....day of....., one thousand nine hundred and.....

Section 79.—**Name of Act.**—This act may be cited as the Uniform Sales Act.

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